(6)

No. 96-1104-CFX
Status: DECIDED

Title: Joseph P. Mazurek, Attorney General of Montana, Petitioner
v.
James H. Armstrong, et al.

Docketed:
January 13, 1997

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Smith,Clay R.

Counsel for respondent: Benshoof,Janet, Measure,Bruce, Graybill,Turner

Entry	Date	Note	Proceedings and Orders
13	May 19 1996		REDISTRIBUTED. May 22, 1997 (Page 15)
1	Jan 13 1997	G	Petition for writ of certiorari filed. (Response due March 28, 1997)
3	Feb 7 1997		Order extending time to file response to petition until March 14, 1997.
4	Mar 12 1997		Order further extending time to file response to petition until March 28, 1997.
5	Mar 28 1997		Brief of respondents James Armstrong, et al. in opposition filed.
6	Apr 9 1997		DISTRIBUTED. April 23, 1997 (Page 1)
7	Apr 10 1997	X	Reply brief of petitioner Joseph Mazurek, Attorney General of Montana filed.
9	May 5 1997		REDISTRIBUTED. May 8, 1997 (Page 25)
11	May 12 1997		REDISTRIBUTED. May 15, 1997 (Page 12)
15	May 27 1997		REDISTRIBUTED. May 29, 1997 (Page 12)
17	Jun 2 1997		REDISTRIBUTED. June 5, 1997 (Page 12)
19	Jun 9 1997		REDISTRIBUTED. June 12, 1997 (Page 14)
20	Jun 16 1997		Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Stevens with whom Justice Ginsburg and Justice Breyer join. Opinion per curiam.

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FILED

961104 JAN 13 1997

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No. 96-

In The

Supreme Court of the United States

October Term, 1996

JOSEPH MAZUREK, in his official capacity as Attorney General of the State of Montana,

Petitioner,

v.

JAMES H. ARMSTRONG, M.D.; MARK MILES, M.D.; SUSAN WICKLUND, M.D.; SUSAN CAHILL, P.A.; MARY STRANNAHAN, D.O.; BETH E. THOMPSON, M.D.; and EDWIN L. STICKNEY, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada and on behalf of a class of performing and referring physicians,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals err in determining that the Respondents possessed a fair chance of success for purposes of a preliminary injunction on their claim that a state statute, which limits the performance of abortions to licensed physicians, constitutes an undue burden under the Fourteenth Amendment to the United States Constitution and in directing the District Court on remand to determine whether "in fact" the statute can be regarded as serving a legitimate health function?

PARTIES

The Petitioner is Joseph P. Mazurek in his official capacity as Attorney General of the State of Montana.

The Respondents are James H. Armstrong, Susan Wicklund, Susan Cahill, Mary Stranahan, Beth E. Thompson, and Edwin L. Strickney.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph P. Mazurek, in his official capacity as Attorney General for the State of Montana, respectfully requests that a writ of certiorari issue to review the opinion and judgment of the court of Appeals for the Ninth Circuit entered in the proceeding below on August 27, 1996.

OPINIONS BELOW

The opinion of the Court of Appeals was filed on August 27, 1996, is reported at 94 F.3d 566, and is reprinted in the Appendix commencing at page 1a.

The opinion of the District Court was filed on September 29, 1995, is unreported, and is reprinted in the Appendix commencing at page 9a.

JURISDICTION

The Respondents' claims before the District Court arose under 42 U.S.C. § 1983, and federal jurisdiction existed under 28 U.S.C. § 1343. On September 29, 1995 the District Court denied the Respondents' motion for preliminary injunction, and they filed a notice of appeal from such denial on October 2, 1995. Appellate jurisdiction existed under 28 U.S.C. § 1292(a)(1).

The opinion of the Court of Appeals vacating the District Court's order and remanding the matter for reconsideration of the preliminary injunction motion was filed on August 27, 1996. The Petitioner filed a timely

petition for rehearing with suggestion for rehearing en banc on September 6, 1996. The petition for rehearing was denied on October 24, 1996. Jurisdiction over the petition for certiorari exists under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> AMENDMENT XIV
>
> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 37-20-103 of the Montana Code Annotated (1995) provides:

> **Limitations on authority conferred – exception.** Except as provided in 37-10-102, nothing in this chapter may be construed to authorize a physician assistant-certified to perform those functions and duties specifically delegated by law to persons licensed as optometrists, as defined under Title 37, chapter 10. A physician assistant-certified may not perform an abortion.

Section 50-20-109 of the Montana Code Annotated (1995) provides in relevant part:

> **Control of practice of abortion.** (1) An abortion may not be performed within the state of Montana:
>
> (a) except by a licensed physician;
>
> . . . .
>
> (5) The utilization plan of a physician assistant-certified may not provide for performing abortions.

The entirety of 1995 Montana Laws chapter 321, which added subsection (5) quoted above, is reprinted in the Appendix commencing at 29a.

STATEMENT OF THE CASE

In *Doe v. Esch*, No. CV-93-060-GF-PGH (D. Mont.), three of the present Respondents challenged the constitutionality of Mont. Code Ann. § 50-20-109(1)(a) (1993) which provided then, as now, that abortions must be performed by a licensed physician. This issue was not resolved by the District Court because the *Esch* defendants, who included the Petitioner, stated in their answer that the term "licensed physician" encompassed physician assistants-certified working under the direct supervision of a physician pursuant to a utilization plan approved by the Montana Board of Medical Examiners. That construction was based on the status of a physician assistant-certified under Mont. Code Ann. § 37-20-403 (1993) as an agent of the supervising physician; the authority of the Board of Medical Examiners under Mont.

Code Ann. § 37-20-303 (1993) to approve physician assistant-certified utilization plans detailing the permissible range of a physician assistant-certified's practice; and the Board's administrative construction of its authority under such provision by approving in March 1983, and thereafter annually reapproving, respondent Susan Cahill's utilization plan that provided for performance of first trimester abortion by suction curettage. A judgment was entered in November 1993 reflecting the defendants' construction of § 50-20-109(1)(a). Pet. App. 33a.

The Montana legislature disagreed with this construction of the involved statutes and in 1995 enacted a clarifying statute stating in part that "[t]he utilization plan of a physician assistant-certified may not provide for performing abortions." 1995 Mont. Laws ch. 321, § 2 (codified at Mont. Code Ann. § 50-20-109(5) (1995)). Pet. App. 29a. The legislative history relevant to Chapter 321 was submitted to the District Court and consists of minutes and exhibits from hearings on February 10, 1995 before the House Committee on Human Services and Aging and on March 10 and 15, 1995 before the Senate Committee on Public Health, Welfare and Safety. Representative Susan Smith, the bill's principal sponsor, indicated before the House committee the legislation would "clarify that only a physician could perform an abortion" and that its "intent was to protect women who are seeking a legal abortion from possible complications [by] . . . ensur[ing] . . . the most qualified accessible medical care possible." *Id.* 36a, 45a. She repeated before the Senate committee her belief that the legislation was "a women['s] health and safety issue" and that "[t]here needs to be access to quality health care" which, with

respect to abortions, was provided best by a qualified physician. *Id.* 65a.

Although approved by the Governor on April 3, 1995, Chapter 321 was not scheduled to become effective until October 1, 1995. The proceeding below was initiated in July 1995, alleging claims under 42 U.S.C. § 1983 and jurisdiction under 28 U.S.C. § 1343. In relevant part, the Respondents challenged the physician-only requirement in § 50-20-109(1)(a) and (5) under the Fourteenth Amendment's Due Process and Equal Protection Clauses and under the Bill of Attainder Clause in Article I, Section 10 of the Constitution. In August 1995 the Petitioner moved for summary judgment, and in September the Respondents requested that implementation of Chapter 321 be enjoined preliminarily. Following a hearing concerning the latter's motion on September 29, 1995, the District Court entered a memorandum and order denying their request with respect to the physician-only requirement. Pet. App. 9a.

As to the due process challenge to the physician-only requirement, the District Court concluded the Respondents had failed to establish that a "purpose" of Chapter 321 was "to place a substantial obstacle in the path of a woman who chooses to exercise her right to seek an abortion before the fetus attains viability" (Pet. App. 21a) and that "[t]here exists insufficient evidence in the record to support the conclusion the requirement that a licensed physician perform an abortion would amount, 'in practical terms[] to a substantial obstacle to a woman seeking an abortion' " (*id.* 22a (quoting *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (joint op.)). While indicating its belief that "the history attendant to the

Montana Legislature's enactment of Chapter 321 reflects[] not all of the legislators voting in favor of Chapter 321 were motivated by a desire to foster the health of a woman seeking an abortion," the court reasoned it could not "usurp the function of the Montana State Legislature by assuming, as the plaintiffs ask it to do, that none of the individual legislators was motivated by a desire to foster the health of a woman seeking an abortion" and that, under *Casey*, its role was a narrow one because of the States' wide latitude in determining whether certain aspects of the abortion process should be performed by a particular class of licensed professionals. *Id.*

The Court of Appeals vacated the District Court's denial of the Respondents' motion for preliminary injunction, applying established Ninth Circuit standards under which the movant must establish "either a likelihood of success on the merits and possibility of irreparable injury[] or that serious questions are raised and the balance of hardships tips sharply in the movant's favor." Pet. App. 5a. The court began its substantive analysis by observing that in *Casey* this Court had defined an undue burden to include "a State regulation [which] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus." *Id.* The Court of Appeals then criticized the District Court's "view of its ability to consider the purpose or effect of the legislation [as] . . . unduly confined for the purpose of assessing whether appellants have a fair chance of ultimate success." *Id.* 6a.

The Court of Appeals next discussed what it viewed as the correct analytical approach. It stated that this Court "has not elaborated on the means of determining

legislative purpose under the *Casey* standard" but, citing *Miller v. Johnson*, 115 S. Ct. 2475 (1995), proposed as the appropriate test whether an improper purpose – i.e., imposing a medical restriction for no reason " 'other than to make abortions more difficult' " – existed was to determine " 'the predominant factor motivating the legislature's decision.' " Pet. App. 6a. "A determination of purpose in the present case," the court held, "may properly require an assessment of the totality of circumstances surrounding the enactment of Chapter 321, and whether that statute *in fact* can be regarded as serving a legitimate health function." *Id.* 7a (emphasis supplied).

Disclaiming any intent "to rule upon the propriety of a preliminary injunction, and certainly not on the propriety of a permanent injunction," the Court of Appeals nonetheless held the Respondents had shown the requisite " 'serious question.' " Pet. App. 7a. Since that "threshold" was reached, in the court's view the only remaining issue for preliminary injunction purposes was a balancing of hardships. *Id.* With respect to that issue, the court found the District Court had erred in focusing on the hardship to respondent Cahill and stated "an adequate weighing" demanded consideration of those hardships experienced by all Respondents and by their patients. *Id.* It accordingly vacated the order denying the preliminary injunction motion and remanded the case for reconsideration of the motion. The mandate issued following denial of the Petitioner's petition for rehearing with suggestion for rehearing en banc, and the parties stipulated to an injunction under Fed. R. Civ. P. 62(c), allowing respondent

Cahill to resume performance of abortions until resolution of proceedings before this Court. *Id.* 31a.

REASONS FOR GRANTING THE PETITION

Until the Court of Appeals' opinion below, universal agreement existed that a State could limit without violating the Constitution the performance of abortions to licensed physicians. The fountainhead of this consensus was *Roe v. Wade*, 410 U.S. 113 (1973), where the Court expressly recognized the right of States to prohibit all persons other than physicians from performing abortions. *Id.* at 165. This holding was reiterated unanimously less than two years later in *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam), and once again in *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 447 (1983). The Court of Appeals' conclusion that the Respondents have established a "fair chance of success" is thus anomalous, since this Court's decisions indicate that physician-only requirements such as that here are per se valid.

No less anomalous is the Court of Appeals' reliance on the joint opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), as support for its new rule of constitutional jurisprudence. Not only did *Casey* reaffirm *Roe* in various respects, but, to the extent it modified the earlier decision, *Casey* created *greater* latitude for the States to regulate abortions. *Id.* at 878-79. Even more directly relevant is the fact that *Casey* overruled *Akron* in certain respects, including the earlier decision's invalidation of a statutory provision requiring

physicians to give portions of a patient advisement. *Id.* at 884-85.

The Court of Appeals' error in failing to recognize the settled nature of the issue here is compounded by its direction that the District Court determine legislative purpose in part by reference to whether "in fact" the physician-only requirement can be regarded "as serving a legitimate health function." Pet. App. 7a. Since it must be assumed the Court of Appeals was aware *Roe* and later cases were premised on the principle that physician-only requirements do serve the health interests of women seeking abortions, the court plainly has in mind an inquiry directed at determining not whether the Montana legislature had a rational basis for the requirement but whether, after full evidentiary development, the record establishes physician assistants can perform certain classes of abortions as safely as qualified physicians. Even were *Casey*'s reference to "purpose or effect" in its formulation of the undue burden standard read properly as inviting reconsideration of *Roe*'s approval of a physician-only requirement, the "purpose" test is not the one fabricated out of whole cloth by the Court of Appeals; it instead is whether *a* valid purpose can be assigned to the regulation – i.e., the rational basis test employed in *Casey* with respect to the physician-only portion of the patient advisement. 505 U.S. at 885 (citing *Williamson v. Lee Optical of Okla., Inc.*, 343 U.S. 483 (1955)).

The Court of Appeals' decision represents, in sum, a radical departure from previously accepted parameters of state discretion in regulating the performance of abortions. It requires the Petitioner to engage in expensive, time-consuming litigation over preliminary injunctive

relief that, given the nature of the remand, is virtually assured. Only early intervention by this Court will impress upon panels like that below the obligation to adhere to binding precedent even when, as appears the situation here, the lower court finds adherence distasteful.

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THIS COURT'S REPEATED ASSURANCE THAT STATES MAY LIMIT THE PERFORMANCE OF ABORTIONS TO LICENSED PHYSICIANS.

Absent from the Court of Appeals' opinion is any reference to this Court's opinions addressing the propriety of state laws that limit to licensed physicians those persons who may perform abortions. The first of the cases *not* mentioned is the cornerstone of the undue burden standard the court below purported to apply, *Roe v. Wade*, 410 U.S. 113 (1973). There, this Court struck down as overbroad a Texas statute prohibiting abortions except for the purpose of saving the mother's life. It nonetheless stressed that States have "a legitimate interest in seeing that abortion like any other medical procedure is performed under circumstances that insure maximum safety for the patient" and that such interest "obviously extends at least to the *performing physician* and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise." *Id.* at 150 (emphasis supplied). In the penultimate part of the opinion, the Court reiterated the discretion accorded States in this

respect, holding that a "State may define the term 'physician[]' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." *Id.* at 165. The latter statement was included among the Court's general guidelines governing the permissible scope of abortion regulation by States.

Substantial litigation arose after *Roe* concerning whether abortion statutes unenforceable against licensed physicians could be enforced against nonphysicians – i.e., whether the effect of *Roe* was to invalidate such statutes as a matter of federal law in their entirety.[1] In *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam), the Court made clear that *Roe* did not render null and void statutes inconsistent with its trimester approach so as to prevent prosecution of nonphysicians for performing abortions. It reasoned that "the rationale of our decision supports continued enforceability of criminal abortion statutes against nonphysicians" because, even during the first trimester, a State's interest in maternal health is sufficient to support a physician-only requirement. *Id.* at 171.

This Court next confronted a physician-only requirement in *City of Akron v. Akron Center for Reproductive*

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[1] *E.g.*, *Spears v. Circuit Court*, 517 F.2d 360, 364 (5th Cir. 1975); *State v. Norflett*, 337 A.2d 609, 616 (N.J. 1975); *May v. State*, 492 S.W.2d 888 (Ark. 1973); *People v. Brickley*, 208 N.W.2d 172 (Mich. 1973); *Spears v. State*, 278 So. 2d 443 (Miss. 1973); *cf. People v. Norton*, 507 P.2d 862 (Colo. 1973) (invalidating portions of abortion statute other than, inter alia, licensed physician requirement).

Health, Inc., 462 U.S. 416 (1983), where a municipal ordinance imposed a nondelegable duty on the attending physician to inform his or her patient of the risks associated with the proposed abortion and any other information the physician deemed relevant to the patient's decision to abort. The Court found no constitutional impropriety in the substance of the required advisement but did hold the physician-only aspect invalid, since "the State's interest is ensuring that the woman's consent is informed and unpressured" and thus "the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it." *Id.* at 448. It buttressed this holding by pointing to the ability of States to "establish minimum qualifications for those people who perform the primary counseling function" and noted the general ethical obligation of the physician not "to abdicate his essential role as the person ultimately responsible for the medical aspects of the decision to perform the abortion." *Id.* at 448-49. Despite its refusal to approve the mandated physician-only advisement requirement, the Court repeated "that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions." *Id.* at 447.

Akron's holding with respect to the physician-only requirement in the advisement process was overruled in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The Court's joint opinion observed that the record contained no evidence that the requirement "would amount in practical terms to a substantial obstacle to a woman seeking an abortion" and that "[o]ur cases reflect the fact that the Constitution gives the States

broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." *Id.* at 884-85. Nothing in *Casey* suggested that its reformulation of the undue burden standard was intended to open for reconsideration by lower courts the existing rule that States possess the authority to restrict the performance of abortions to physicians. That reformulation was intended to broaden, not reduce, state discretion as indicated by the overruling of *Akron* with respect to the physician-only feature of the advisement requirement.

The Court of Appeals' reliance on the statement in *Casey* that an undue burden may arise from "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion" (505 U.S. at 878) as modifying sub silentio the holding in *Roe* and subsequent cases concerning the right of States to limit the performance of abortions to licensed physicians is untenable. That statement was directed to the class of medical procedure-related restrictions which had been the focus of much post-*Roe* litigation.[2] The

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[2] *See, e.g., Webster v. Reproductive Health Servs.*, 492 U.S. 490, 519-20 (1989) (holding mandatory viability testing at 20 or more weeks of gestational age valid in light of variation in age of viability, even though in many instances tests will show no viability and will increase cost of abortions); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 769-71 (1986) (invalidating requirement that second physician be present when viability possible in absence of express or implied emergency condition exception); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 495 (1983) (finding second physician requirement in third trimester

salient point here, and the one seemingly lost upon the court below, is that the entirety of this Court, notwithstanding intense division over the constitutional permissibility of these restrictions, has never wavered from the core notion that it is permissible for a state legislature to require all abortions to be performed by a physician. Accepting the animating predicate of the Court of Appeals' opinion – that the Respondents have shown a "fair chance of success" on the merits – simply cannot be squared with what every other lower court has considered to be resolved conclusively against their position.[3]

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abortions valid because State could assume reasonably that first physician would be concerned principally with the mother's well-being and that the second physician would be of assistance in preserving child's life); *Akron*, 462 U.S. at 434 (invalidating as overbroad requirement that second trimester abortions be performed in hospital since State had failed "to limit the effect of its regulations to the period in the trimester during which the health interest will be furthered"); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 79 (1976) (invalidating statute prohibiting saline amniocentesis from use as method of abortion after the first trimester "where the outright legislative proscription of saline fails as a reasonable regulation for the protection of maternal health").

[3] *See, e.g., Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352, 364 (6th Cir. 1984) (State "may constitutionally insist that only properly licensed physicians be permitted to perform abortions"); *Florida Women's Medical Clinic, Inc. v. Smith*, 536 F. Supp. 1048, 1057 (S.D. Fla. 1982) (State may limit performance of first trimester abortions to licensed physicians), *appeal dismissed*, 706 F.2d 1172 (11th Cir. 1983); *Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft*, 483 F. Supp. 679, 684-85 (W.D. Mo. 1980) (as applied to nonphysican performing abortion on another person, statute restricting abortion practice to physicians held "clearly valid"), *rev'd in part on other grounds*, 655 F.2d 848 (8th Cir.), *modified*, 664 F.2d 687 (8th Cir. 1981), *aff'd*,

The clarity and unanimity of precedent as to this bedrock element of this Court's abortion jurisprudence counsel strongly in favor of rectifying immediately the Court of Appeals' misreading of *Casey*. The Respondents, in short, have shown *no* chance of success on the merits with respect to their Due Process Clause-based claim, and preliminary injunctive relief is therefore unavailable as a matter of law. *Thornburgh*, 476 U.S. at 755; *see also id.* at 818 (O'Connor, J., dissenting).[4]

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462 U.S. 476 (1983); *Smith v. Bentley*, 493 F. Supp. 916, 927 (E.D. Ark. 1980) ("States can prohibit, without running afoul of the constitution, nonphysicians from performing abortions during any stage of pregnancy"); *Wright v. State*, 351 So. 2d 708, 711 (Fla. 1977) (upholding conviction of nurse for performing abortion in violation of statutory physician requirement); *see also* Cal. Att'y Gen. Op. No. 90-926 (1991) (under California law, physician assistant may not perform abortions).

[4] It should be reiterated that, in concluding the Respondents showed a fair chance of success, the Court of Appeals did not explain why. Presumably, as discussed below, the court believed the Respondents had made a sufficient showing that properly trained physician assistants generally, or respondent Cahill specifically, can perform at least certain types of abortions as safely as physicians. The Respondents, in this regard, argued below that "the court must look behind [the stated health] purpose" of the physician-only requirement, that "all available evidence shows that properly trained physician assistants perform first-trimester abortions with complication rates equal to or lower than corresponding rates for physicians," and that respondent Cahill "has [performed abortions] safely for eighteen years." Brief of Appellants at 27-28, *Armstrong v. Mazurek*, 94 F.3d 566 (9th Cir. 1996) (per curiam) (No. 95-35962).

II. THE COURT OF APPEALS ERRED IN DIRECTING THE DISTRICT COURT TO ENGAGE IN AN EVIDENTIARY ASSESSMENT OF WHETHER "IN FACT" MONTANA'S PHYSICIAN-ONLY REQUIREMENT SERVES A LEGITIMATE HEALTH FUNCTION.

The Court of Appeals instructed the District Court on remand to consider the "totality of circumstances surrounding the enactment of Chapter 321" and whether the physician-only requirement "in fact can be regarded as serving a legitimate health function" in determining the existence of an impermissible legislative purpose. Pet. App. at 7a. The court unquestionably viewed the "in fact" analysis as entailing an evidentiary assessment of whether the Montana legislature was correct in concluding that the physician-only requirement furthers the safety of the abortion procedure. Thus, under the Court of Appeals' proposed application of *Casey*, if an objective assessment of the evidence establishes a properly trained physician assistant can perform certain types of abortions in a manner comparably safe to that of a physician, the legislature will be deemed to have no health-related justification for the physician-only requirement and to have imposed an undue burden on affected women.

Even if one assumes the need to examine the "purpose or effect" of a physician-only requirement despite its approval in *Roe* and later cases, the Court of Appeals' suggested standard runs afoul of *Casey* itself. In distilling *Roe*'s "essential holding[s]," the *Casey* joint opinion "reject[ed] the trimester framework" (505 U.S. at 873) and observed that "[n]umerous forms of state regulation might have the incidental effect of increasing the cost or

decreasing the availability of medical care, whether for abortion or any other medical procedure" (*id.* at 874). "The fact," the Court continued, "that a law which serves *a* valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it." *Id.* (emphasis supplied). Consequently, where *a* valid purpose exists, an undue burden arises only when the regulation constitutes a "substantial obstacle" to previability abortion. *Id.* at 878. The existence of a valid purpose is determined through application of the rational basis test. Representative of this approach was the Court's overruling of *Akron*'s holding with respect to the physician-only advisement requirement, where it first found no substantial obstacle "in practical terms" and then relied on the traditional rational basis standard, as reflected in *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955), for the general proposition that States have "broad latitude" as to requiring certain activities or functions be performed only by licensed professionals. *Casey*, 505 U.S. at 884-85.

The breadth of that latitude is reflected in *Williamson*, where this Court sustained against a substantive due process challenge an Oklahoma statute requiring a prescription from a licensed ophthalmologist or optometrist before a pair of glasses could be fitted. The Court reasoned that the statute "may exact a needless, wasteful requirement in many cases" but that "it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement." 348 U.S. at 487. The rational basis test thus does not contemplate legislative judgments, for which "any conceivable state of facts

. . . could provide" reasonable justification (*FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993)), being challenged through a contrary evidentiary showing in a judicial proceeding. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 464-65 (1981). A fortiori a statute limiting the *performance* of an abortion to physicians passes muster under this test if a State can require a physician to give portions of a patient *advisement*.

The Court of Appeals' reliance on racial gerrymandering cases for a contrary result underscores the problematic nature and consequences of its reasoning. As this Court stated in *Miller v. Johnson*, 115 S. Ct. 2475 (1995), the first of the cases cited by the court below, racial classifications touch upon the very heart of the Fourteenth Amendment – i.e., "[i]ts central mandate is racial neutrality in governmental decisionmaking." *Id.* at 2482. Nonetheless, even in this uniquely sensitive area, a litigant must establish a prima facie case before inquiry into legislative objective is appropriate. *Id.* at 2488. Notions of a "prima facie" case are inapposite here because, under *Casey*, the test with respect to "purpose" is whether the particular medical restriction survives rational basis analysis. If it does, no further inquiry is permitted as to purpose; if it does not, the restriction falls. The lower court's failure to recognize that *Casey* does not authorize further inquiry into legislative purpose leaves the judiciary in the position of hypothesizing with little restraint over the "real" intent behind legislation without determining whether the asserted purpose is reasonable. *See Jane L. v. Bangerter*, Nos. 93-4044 & 93-4059, 1996 WL 732494, at *4 (10th Cir. Dec. 23, 1996) (relying on the decision below and finding improper purpose behind

statute that restricted abortions after twenty weeks gestational age, because "the Utah legislature's intent in passing the abortion provisions was to provide a vehicle by which to challenge *Roe v. Wade*, as demonstrated by the legislature's establishment of an abortion litigation trust account").

The Court of Appeals, finally, did not suggest the Respondents had shown a "fair chance of success" of proving that the physician-only requirement cannot be sustained under the rational basis standard. Any such suggestion, aside from its inconsistency with *Roe*, *Menillo* and *Akron*, would bring into doubt similar restrictions in virtually every State.[5] The very novelty of the claim here

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[5] In connection with a motion for preliminary injunction filed before the Court of Appeals in October 1995, the Respondents submitted the affidavit of David Grimes, M.D., chief of the Department of Obstetrics, Gynecology and Reproductive Sciences at San Francisco General Hospital, as well as professor at the University of California at San Francisco. He identified only two States, Montana prior to enactment of Chapter 321 and Vermont, where physician assistants have performed abortions. This fact is unsurprising. A substantial majority of States have statutory provisions limiting the performance of abortions to physicians. Alaska Stat. § 18.16.010(a)(1) (Michie 1994); Ark. Stat. Ann. § 5-61-101(a) (Michie 1993); Cal. Health & Safety Code § 123405 (West 1996); Colo. Rev. Stat. § 18-6-101(1) (1986); Del. Code Ann. tit. 24, § 1790(a) (Supp. 1994); Fla. Stat. Ann. § 390.001(3) (West 1993); Ga. Code Ann. § 16-12-141(a) (1994); Haw. Rev. Stat. § 453-16(a)(1) (1993); Idaho Code § 18-608 (1987); Ill. Comp. Stat. Ann. ch. 720, § 510/3.1 (West 1993); Ind. Code Ann. § 16-34-2-1 (Michie 1993); Iowa Code Ann. § 707.7 (West 1993); Kan. Stat. Ann. § 65-6706(b) (1992); Ky. Rev. Stat. Ann. §§ 311.750, 311.760(1) (Michie 1995); La. Rev. Stat. Ann. § 40:1299.35.2.A (West 1992); Me. Rev. Stat. Ann. tit. 22, § 1598.3.A (1992); Md.

counsels against any plausible contention that restricting the performance of abortions to licensed physicians furthers health concerns " 'could not reasonably be conceived to be true by the governmental decisionmaker' " (*Clover Leaf Creamery*, 449 U.S. at 464), since almost all state legislatures and regulators have concluded otherwise. When the appropriate standard is applied, therefore, the Respondents have failed to establish likelihood

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Code Ann., Health-Gen. II, § 20-208 (Supp. 1995); Mass. Gen. Laws Ann. ch. 112, §§ 12L, 12M, 12N (West 1996); Minn. Stat. Ann. § 145.412.1(1) (West 1989); Miss. Code Ann. § 97-3-3(1) (1984); Mo. Rev. Stat. §§ 188.020, 188.080 (1994); Neb. Rev. Stat. § 28-335 (1995); Nev. Rev. Stat. Ann. § 442.250(1)(a) (Michie 1991); N.M. Stat. Ann. §§ 30-5-1(C), 30-5-3 (Michie 1994); N.Y. Penal Law §§ 125.05.3, 125.40 (McKinney 1987); N.C. Gen. Stat. § 14.45.1(a) (1993); N.D. Cent. Code § 14-02-1-04(1) (1991); Ohio Rev. Code Ann. §§ 2919.11, 4731.41 (Anderson 1993); Okla. Stat. Ann. tit. 63, § 1-731.A (West 1984); Pa. Cons. Stat. Ann. tit. 18, § 3204(a) (West 1983); S.C. Code Ann. § 44-41-20 (Law Co-op. 1985); S.D. Codified Laws § 22-17-5 (Michie 1988), & §§ 34-23A-3, 34-23A-4, 34-23A-5 (Michie 1994); Tenn. Code Ann. § 39-15-201(c) (1991); Tex. Health & Safety Code Ann., § 245.010(b) (West 1992); Utah Code Ann. § 76-7-302(1) (1995); Va. Code Ann. §§ 18.2-71, 18.2-72, 18.2-74, 18.2-74.1 (Michie 1996); Wash. Rev. Code Ann. §§ 9.02.110, 9.02.120 (West Supp. 1997); Wis. Stat. Ann. § 940.15(5) (West 1996); Wyo. Stat. Ann. § 35-6-111 (Michie 1994). Administrative regulations in several others accomplish the same end. Ala. Dep't of Public Health, State Board of Health Rules, ch. 420-5-1.03(2)(a) (1990); Conn. Dep't of Health Services, Rules of Practice, § 19-13-D54(a) (1974); N.J. Admin. Code § 13:35-4.2(b) (1994); R.I. Dep't of Health, Rules & Regulations for the Termination of Pregnancy, § 600.1 (1984). In one State, this result has been achieved by limiting construction of a statute otherwise prohibiting any person from inducing a miscarriage except to preserve the woman's life. *Bricker*, 208 N.W.2d at 529-30 (construing Mich. Comp. Laws Ann. § 750.14 (West 1991)).

of success on the merits even if physician-only requirements of the kind here are not per se valid.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

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January 1997

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN H. ARMSTRONG, M.D.; MARK MILES, M.D.; SUSAN WICKLUND, M.D.; SUSAN CAHILL, P.A.; MARK STRANAHAN; MARY THOMPSON, M.D.; EDWIN STICKNEY, M.D.; on behalf of themselves and their patients throughout Montana, the surrounding states and Canada and on behalf of a class of performing and rehearing physicians,
Plaintiffs-Appellants,

v.

JOSEPH MAZUREK, Attorney General of the State of Montana,
Defendant-Appellee.

No. 95-35962
D.C. No.
CV-95-83-PGH

OPINION

Appeal from the United States District Court
for the District of Montana
Paul G. Hatfield, Chief District Judge, Presiding

Argued and Submitted to Motions Panel
February 28, 1996 – San Francisco, California

Filed August 27, 1996

Before: Harry Pregerson, William C. Canby, Jr. and Michael Daly Hawkins, Circuit Judges.

Per Curiam Opinion

SUMMARY

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Health/Reproductive Rights/
Civil Litigation and Procedure

The court of appeals vacated a district court order and remanded. The court held that remand was warranted so that the district court, which had denied a motion for a preliminary injunction against enforcement of a Montana statute restricting the performance of abortions to licensed physicians, could engage in a proper balancing of the hardships and exercise its discretion anew.

Chapter 321 of the 1995 Montana Session Laws, passed as House Bill No. 442, restricts the performance of abortions to licensed physicians. Appellants, licensed physicians and a physician's assistant who are engaged in providing health care including abortions (collectively, the Plaintiffs), sought a permanent injunction against enforcement of Chapter 321 on the ground that the purpose and effect of the statute is to present a "substantial obstacle" to a woman's obtaining an abortion within the meaning of Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992). They also sought to invalidate the statute as a bill of attainder directed at appellant Susan Cahill, the physician's assistant.

The district court denied a preliminary injunction against enforcement of Chapter 321 to permit Cahill to continue to perform abortions until the district court was able to

rule on the question of permanent relief. The court considered itself unable to impugn the health purpose of the statute and found insufficient evidence that the statute posed a practical obstacle to the obtaining of an abortion. The court considered it "unlikely" that the Plaintiffs could prevail on their "undue burden" argument. The court also concluded that because there appeared to be a legitimate purpose for the statute, the bill of attainder claim was unlikely to succeed. The Plaintiffs appealed the denial of their motion for a preliminary injunction.

[1] The district court's view of its ability to consider the purpose or effect of the legislation was unduly confined for the purpose of assessing whether the Plaintiffs had a fair chance of ultimate success. A proper inquiry was whether "the requirements serve no purpose other than to make abortions more difficult." [2] The Plaintiffs presented claims having at least the minimum "fair chance of success." They presented a "serious question" requiring a balancing of the hardships to determine the appropriateness of preliminary relief.

[3] The district court did not truly balance the hardships and stated that the harm on the Plaintiffs' side was only to Cahill. An adequate weighing of the Plaintiffs' hardships must also include consideration of the hardship to the patients. [4] In addition, the district court did not address the countervailing hardships to the state, or the absence of them. [5] Remand was warranted to the district court so that it could, after such proceedings as it deemed appropriate, engage in a proper balancing of the hardships and exercise its discretion anew.

COUNSEL

Janet Benshoof and Simon Heller, The Center for Reproductive Law and Policy, New York, New York; Bruce Measure, Law Offices of Ambrose Measure, Kalispell, Montana; Turner Graybill, Graybill, Ostrem, Warner and Crotty, Great Falls, Montana, for the plaintiffs-appellants.

Clay R. Smith and Elizabeth Baker, Assistant Attorney General, Helena, Montana, for the defendant-appellee.

James Bopp, Jr., Bopp, Coleson and Bostrom, Terre Haute, Indiana, for the amici curiae.

OPINION

PER CURIAM:

James H. Armstrong, M.D., Susan Cahill and others appeal the district court's denial of their motion for a preliminary injunction against enforcement of Chapter 321 of the 1995 Montana Session Laws, passed as House Bill No. 442 (HB 442), a bill restricting the performance of abortions to licensed physicians. Appellants are licensed physicians or, in the case of Cahill, a physician's assistant, who are engaged in providing health care including abortions. Cahill is the only physician's assistant in Montana who performs abortions, which she has done in the past under the supervision of a medical doctor and as approved by the Montana State Board of Medical Examiners.

Appellants ultimately seek a permanent injunction against enforcement of Chapter 321, on the ground that the purpose and effect of the statute is to present a

"substantial obstacle" to a woman's obtaining an abortion, within the meaning of Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 877 (1992). They also seek to invalidate the statute as a bill of attainder directed at Cahill.

The matter presently before us, however, is the district court's denial of a preliminary injunction against enforcement of Chapter 321 to permit Cahill to continue to perform abortions until the district court is able to rule on the question of permanent relief. Preliminary injunctive relief is appropriate if the movant has shown either a likelihood of success on the merits and the possibility of irreparable injury, or that serious questions are raised and the balance of hardships tips sharply in the movant's favor. United States v. Odessa Union Warehouse Co-op, 833 F.2d 172 (9th Cir. 1987). At the very minimum, the moving party must show a fair chance of success on the merits. Stanley v. University of Southern California, 13 F.3d 1313, 1319 (9th Cir. 1994). We review the district court's order to determine whether the court applied the proper legal standard and whether it abused its discretion in applying that standard. See Sports Form, Inc. v. United Press Int'l, Inc., 686 F.2d 750, 752 (9th Cir. 1982).

The district court quite correctly understood that the application of Casey's "undue burden" standard is crucial to the determination of appellants' ultimate claims: "A finding of undue burden is a shorthand for the conclusion that a State regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus." Casey, 505 U.S. at 877. The district court also acknowledged Casey's admonition that "unnecessary health regulations that

have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." Id. at 878.

The district court, however, considered itself unable to impugn the health purpose of the statute because it could not assume that "none of the individual legislators approving the passage of Chapter 321 was motivated by a desire to foster the health of a woman seeking an abortion." It also found insufficient evidence that the statute posed a practical obstacle to the obtaining of an abortion. Consequently, the district court considered it "unlikely" that the appellants could prevail on their "undue burden" argument. It also concluded that, because there appeared to be a legitimate purpose for the statute, the bill of attainder claim was unlikely to succeed.

[1] While we express no opinion on the appropriateness of permanent relief, we conclude that the district court's view of its ability to consider the purpose or effect of the legislation was unduly confined for the purpose of assessing whether appellants have a fair chance of ultimate success. One proper inquiry, for example, is whether "the requirements serve no purpose other than to make abortions more difficult." Casey, 505 U.S. at 901. While the Supreme Court has not elaborated on the means of determining legislative purpose under the Casey standard, it has done so in other contexts. Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was "the predominant factor motivating the legislature's decision." Miller v. Johnson, 115 S. Ct. 2475, 2488 (1995). Such a

forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment. Shaw v. Hunt, 64 U.S.L.W. 4437, 4439 (U.S. June 13, 1996). A determination of purpose in the present case, then, may properly require an assessment of the totality of circumstances surrounding the enactment of Chapter 321, and whether that statute in fact can be regarded as serving a legitimate health function.

[2] While we do not now rule upon the propriety of a preliminary injunction, and certainly not on the propriety of a permanent injunction, we conclude that appellants present claims having at least the minimum "fair chance of success." Stanley, 13 F.3d at 1319. That threshold passed, we conclude, as did the district court, that the appellants presented a "serious question" requiring a balancing of the hardships to determine the appropriateness of preliminary relief. See Los Angeles Memorial Coliseum Comm. v. National Football League, 634 F.2d 1197, 1201 (9th Cir. 1980).

[3] The district court, however, did not truly balance the hardships, and stated that the harm on plaintiffs' side was only to Susan Cahill. An adequate weighing of plaintiffs' hardships must also include consideration of the hardship to the patients, whether or not it reaches constitutional proportions. Plaintiffs are entitled to assert their patients' rights along with their own. Singleton v. Wulff, 428 U.S. 106, 113-18 (four-Justice plurality), 121 (Stevens, J.) (1976).

[4] There was another omission by the district court which is perhaps even more important in the context of

this case. The district court did not address the countervailing hardships to the State, or the absence of them. Only when the extent, if any, of the State's hardship is known can it be determined which way the balance tips and how sharply.

[5] The district court was clearly sensitive to the delicate issues presented by this case, as are we. We conclude that it would be inappropriate to address the propriety of a preliminary injunction without the benefit of the district court's balancing of the hardships in light of this opinion. Proper balancing is part of the standard for determining the propriety of preliminary relief, and the district court's order may be overturned on review if the standard is erroneously applied. See Sports Form, 686 F.2d at 752. We consequently vacate the district court's order and remand to the district court so that it may, after such proceedings as it deems appropriate, engage in a proper balancing of the hardships and exercise its discretion anew. Should another appeal then be taken, the record will be in an appropriate state to permit this court to review the district court's decision granting or denying preliminary relief.

The district court's order denying preliminary relief is VACATED and this appeal is REMANDED to the district court for further proceedings consistent with this opinion.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JAMES H. ARMSTRONG, M.D.; MARK MILES, M.D.; SUSAN WICKLUND, M.D.; SUSAN CAHILL P.A.; MARY STRANAHAN, D.O.; BETH E. THOMPSON, M.D.; and EDWIN L. STICKNEY, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada and on behalf of a class of performing and referring physicians, Plaintiffs, vs. JOSEPH MAZUREK, in his official capacity as Attorney General of the State of Montana, Defendant.	NO. CV-95-083-GF MEMORANDUM AND ORDER

I. BACKGROUND

The plaintiffs[1] instituted this action for declaratory and injunctive relief under 42 U.S.C. § 1983, challenging the constitutional validity of Chapter 321 of the 1995 Montana Session Laws, otherwise identified as House Bill No. 442 and entitled: "An Act Clarifying That Only a Physician May Perform an Abortion; and Amending Sections 37-20-103 and 50-20-109, M.C.A."

The plaintiffs challenge the following three aspects of Chapter 321 (to be codified at Mont. Code Ann. §§ 37-20-103 and 50-20-109): (1) an abortion may be performed only by a "licensed physician"; (2) an abortion may not be performed after the first trimester of pregnancy, except in a licensed hospital; and (3) the "solicitation, advertising, or other form of communication that has the purpose of inviting, inducing, or attracting any person" to utilize the services of a physician or facility that performs abortion is banned in the State of Montana.

At the outset, it is important to note the latter two proscriptions have previously been declared as unconstitutional. The requirement that an abortion performed after the first trimester must be done in a licensed hospital was an issue resolved by this court in the case of *Doe v. Esch*, No. CV-93-60-GF (judgment entered November

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[1] Plaintiffs Armstrong, Miles and Wicklund are physicians licensed to practice in the State of Montana who provide abortion services. Plaintiffs Stranahan, Thompson and Stickney are physicians licensed to practice in the State of Montana who routinely refer patients to other abortion providers in the State of Montana. Plaintiff Cahill is a physician assistant-certified, who performs abortions in the State of Montana.

26, 1993). The judgment in *Esch*, which enjoined enforcement of the hospitalization requirement of M.C.A. § 50-20-109(1)(b) was entered pursuant to stipulation of the parties. The State of Montana acknowledges in the present action that the State of Montana remains bound by the *Esch* judgment; a fact which would preclude the enforcement of the hospitalization requirement. The advertising/solicitation prohibition, embodied in section 50-20-109(4), is likewise precluded by the judgment entered in *Doe v. Deschamps*, 461 F.Supp. 682 (D.Mont.1976). The State of Montana again acknowledges, as it must, that it remains bound by the judgment in *Deschamps* from enforcing the prohibition against advertising/solicitation.

While the State of Montana acknowledges the unenforceability of the hospitalization requirement and the prohibition against advertising, it suggests there exists no "justiciable controversy" regarding these provisions since the State of Montana is precluded by the referenced judgments from enforcing the same. This argument is hardly compelling in view of the clear unconstitutionality of the two provisions and a judgment declaring the provisions unconstitutional and enjoining their enforcement would be entirely appropriate.

The real focus of this case is upon the constitutionality of the "physicians only" provision of Chapter 321.[2] The provision is set forth in two separate sections of Chapter 321 as follows:

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[2] The plaintiffs, in an effort to ensure that the "physicians only" requirement of Chapter 321 does not become effective, suggests that the various provisions of Chapter 321 are not "severable". Accordingly, so the argument goes, because the

Section 1. Section 37-20-103, MCA, is amended to read:

37-20-103. Limitations on authority conferred – exception. Except as provided in 37-10-102, nothing in this chapter may be construed to authorize a physician assistant-certified to perform those functions and duties specifically delegated by law to persons licensed as optometrists, as defined under Title 37, chapter 10. *A physician assistant-certified may not perform an abortion.*

Section 2. Section 50-20-109, MCA, is amended to read:

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hospitalization and advertising provisions are unconstitutional, Chapter 321 must be declared unconstitutional in its entirety. The argument is without merit. The test for determining severability of a non-constitutional provision of a statute is well established. "Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is 'fully operative as a law.' " *New York v. United States*, 112 S.Ct. 2408, 2434 (1992) (*quoting, Alaska Airlines, Inc., v. Brock*, 480 U.S. 678, 684 (1987)). The Montana Supreme Court acknowledged this principle in *State v. Lance*, 721 P.2d 1258 (Mont. 1986), wherein the court acknowledged the "elementary principle of constitutional law that 'the same statute may be in part constitutional and in part unconstitutional, and . . . if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected.' " *Lance*, 721 P.2d at 1264 (citation omitted). Consistent with the foregoing principle, while the hospitalization and advertising provisions of Chapter 321 are unconstitutional, the "physicians only" provision may legitimately be severed if, in fact, it is found to pass constitutional muster.

50-20-109. Control of practice of abortion. (1) ~~No~~ *An* abortion may *not* be performed within the state of Montana.

(a) except by a licensed physician;

It is important to note that the Montana Legislature enacted the "physicians only" provision in response to the judgment entered in *Esch*. In *Esch*, the court was not ultimately called upon to determine whether a statutory provision precluding the performance of abortions by anyone other than a licensed physician passed constitutional muster. In response to the complaint in *Esch*, the State of Montana acknowledged that the term "licensed physician", as used in Mont. Code Ann. § 50-20-109(1)(a) (1993), included physician assistants who worked under the direct supervision of a physician pursuant to a "utilization plan" approved by the Montana Board of Medical Examiners. The State of Montana emphasizes this construction of the term "licensed physician" was compelled by the then existing statutory law, more particularly Mont. Code Ann. § 37-20-403 (1993) (physician assistant-certified recognized as agent of the supervising physician), Mont. Code Ann. § 37-20-303 (statute draining authority to the Board of Medical Examiners to approve physician assistant-certified utilization plans detailing the permissible range of a physician assistant-certified's practice) together with the Board of Medical Examiners' administrative construction of its authority to approve a utilization plan which allowed a physician's assistant (more specifically plaintiff Susan Cahill P.A.) to perform a first trimester abortion by "suction curettage". The statutory amendments embodied in Chapter 321, the State of

Montana emphasizes, were specifically designed to clarify that only a physician may perform an abortion in the State of Montana.

The plaintiffs predicate their challenge to the constitutionality of the "physicians only" provision of Chapter 321 upon the following four alternate bases:

(1) the purpose of the provision is to impose a substantial obstacle in the path of a woman seeking a previability abortion;

(2) the provision has the effect of imposing a substantial obstacle in the path of a woman seeking a previability abortion;

(3) the provision violates the bill of attainder clause of Article I, section 10 of the federal Constitution because it constitutes a form of legislative punishment directed specifically against plaintiff Cahill (the only physician assistant performing abortions in the State of Montana); and

(4) the provision impermissibly discriminates on the basis of sex by excluding from the permissible scope of practice with physician assistants, a type of medical care sought only by women.

Chapter 321 is to become effective on October 1, 1995. The plaintiffs have moved the court for preliminary injunctive relief, pursuant to Fed.R.Civ.P. 62, to preclude the State of Montana from enforcing the provision of

Chapter 321 which bans the performance of first-trimester abortions by a physician assistant.[3] The State of Montana moves the court, pursuant to Fed.R.Civ.P. 65, to enter summary judgment in that entity's favor declaring, in effect, the validity of the "physicians only" provision of Chapter 321.

The plaintiffs' request for preliminary injunctive relief was heard before the court on September 29, 1995. Having considered the arguments advanced by the parties in support of their respective positions, the court deems it appropriate to DENY the plaintiffs' request that the court preliminarily enjoin the State of Montana from enforcing the "physicians only" provision of Chapter 321.

II. DISCUSSION

A. STANDARD FOR PRELIMINARY INJUNCTIVE RELIEF

The traditional equitable criteria for granting preliminary injunctive relief are "(1) a strong likelihood of success on the merits; (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted; (3) a balance of hardships favoring the plaintiff." *Los Angeles Memorial Coliseum Comm. v. National Football League*, 634 F.2d 1197, 1200 (9th Cir.1980). Alternatively, the moving party must demonstrate "either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised

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[3] Consistent with the court's previous observations, the State of Montana is properly enjoined from enforcing the hospitalization and advertising provisions of Chapter 321.

and the balance of hardships tip sharply in its favor." *Id.*, at 1201. "These are not separate tests but the outer reaches of a single continuum." *Ibid., accord, People of Village of Gambell v. Hodel*, 774 F.2d 1414, 1419 (9th Cir.1985). In the two tests, "the required showing of harm varies inversely with the required showing of meritoriousness." *San Diego Committee Against Registration and the Draft v. The Governing Board of Grossmont Union High School*, 790 F.2d 1471, 1473 (9th Cir.1986). Analysis of these criteria under the circumstances of the present case, compel the court to deny the plaintiffs' motion for preliminary injunctive relief.

The court recognizes that the plaintiffs' challenge to the "physicians only" provision raises a serious question, but is not convinced that under the balance of hardships is such that the court must strike the balance in favor of the plaintiffs' request. While the court's refusal to grant the preliminary injunctive relief requested will operate to preclude plaintiff Cahill from performing abortions, the hardship resulting from the disruption of the *status quo*, a hardship borne only by Cahill, is not accompanied by a sufficient showing of merit in the plaintiffs' position that would warrant provisional relief.

B. "UNDUE BURDEN"

In *Planned Parenthood v. Casey*, 120 L.Ed.2d 674 (1992), the Supreme Court, reiterating a woman's right to choose to terminate her pregnancy prior to viability is protected by the Due Process Clause of the fourteenth amendment, acknowledged that in order to "protect the central right

recognized by *Roe v. Wade* while at the same time accommodating the States' profound interest in potential life, the Court would employ the 'undue burden' analysis in determining whether a state regulation impermissibly infringes upon a woman's right to choose to terminate or continue her pregnancy before viability." 120 L.Ed.2d at 711- 715. The Court stated "an undue burden exists, and therefore a provision of law is invalid if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability." *Id.*, at 715. In discussing the application of the "undue burden" analysis to the context of state regulation of abortion procedures, the Court explained:

> The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where State regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause. . . . A finding of an undue burden is a shorthand for the conclusion that a State regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a non-viable fetus. A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it. In [sic] a statute which, while furthering the interest in potential life or some other valid State interest, has the effect of placing a substantial obstacle in

> the path of a woman's choice cannot be considered a permissible means of serving its legitimate end.

Id., at 712-715.

In summarizing its decision in *Casey*, the Court made the following statement, *inter alia*, that is of particular importance in the present case:

> As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.

Id., at 716.

The plaintiffs in the present case contend that Chapter 321 has both the *purpose* and *effect* of placing a "substantial obstacle" in the path of a woman seeking an abortion of a non-viable fetus and must be, consistent with *Casey*, considered invalid. In support of their position, the plaintiffs argue that all available evidence shows that properly trained physician assistants are capable of performing first-trimester abortions with complication rates equal to or lower than corresponding rates for physicians. Consequently, the plaintiffs argue, the *purpose* of Chapter 321 is not the protection of women's health, but a misguided attempt to limit access to abortions in the State of Montana. Likewise, the plaintiffs argue, because the *effect* of Chapter 321 is to reduce the ability of a woman to obtain an abortion, the "physicians only" provision constitutes a substantial obstacle to the right of a woman to obtain an abortion of a non-viable fetus.

The State of Montana, on the other hand, asserts the "physicians only" provision of Chapter 321 is a legitimate exercise of the State's authority to foster the health and safety of a woman seeking an abortion in the State of Montana. In the opinion of the State, the "physicians only" requirement that [sic] survives scrutiny under the "undue burden" analysis enunciated in *Casey*. The fact the "physicians only" provision may have the incidental effect of increasing the cost or decreasing the availability of abortion services, the State argues, is not fatal under *Casey's* "undue burden" analysis. Support for the State's argument is found in previous Supreme Court decisions. In *Connecticut v. Menillo*, 423 U.S. 9 (1975), the Supreme Court recognized that even in the first trimester of pregnancy, the State's interest in maternal health is sufficient to justify a requirement that an abortion be performed only "by medically competent personnel." 423 U.S. at 11. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court observed that a "State may define the term 'physician' . . . to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." 410 U.S. at 165.

The plaintiffs, however, implore the court not to rely upon the *dicta* enunciated in *Menillo* and *Roe* in determining whether the "physicians only" provision of Chapter 321 withstands analysis under the "undue burden" standard of *Casey*. The plaintiffs contend that focus is properly brought to bear upon the question of whether the State of Montana may legitimately preclude a woman from seeking an abortion from a "medically competent" health professional other than a licensed physician. *Menillo*, 423 U.S. at 10.

There exists a paucity of case law addressing the precise issue presented in this case. The Sixth Circuit Court of Appeals in the case of *Birth Control Centers, Inc. v. Reizen*, 743 F.2d 352 (6th Cir.1984), was called upon to address the validity of a provision of the Public Health Code of Michigan, which provided that a physician performing surgery at a "free-standing surgical outpatient facility" ("FSOF") must:

> Possess adequate qualifications acquired by special training and experience to evaluate the medical . . . conditions, potential risks, recognize and adequately treat emergency complications encountered in any procedure undertaken, and perform the procedure in accordance with the usual standards of medical . . . practice.

743 F.2d at 363.

In addressing the argument that the referenced provision of the Code required special training to perform surgery at an FSOF the court, based upon the State of Michigan's concession that Rule 35(1) does not require that only a specialist perform abortions [sic]. *Id.*, at 364. The court of appeals noted that "Michigan may constitutionally insist that only properly licensed physicians be permitted to perform abortions at FSOFs." *Id.*, at 364. The court in *Reizen* relied upon *dictum* stated by the Supreme Court in *Roe v. Wade* and *Menillo* that has previously been discussed.

The State, as would be expected, argues *Reizen* provides support for its position in this case. The plaintiffs, on the other hand, suggest *Reizen* is distinguishable and stands only for the proposition that because the Michigan Code provision at issue did not impose a requirement of

special physician expertise to perform an abortion at an FSOF, the rule was consistent with the rationale of *Roe v. Wade*. *Reizen*, much like the Supreme Court cases discussed, does not address the precise issue before the court in the present case.

In assessing whether the plaintiffs are likely to ultimately succeed in their contention the "physicians only" provision of Chapter 321 constitutes an "unconstitutional burden" under the standard enunciated in *Casey*, the court remains mindful of the following statement in *Casey*:

> What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, . . . may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose. (citation omitted) . . . Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden.

120 L.Ed.2d at 715.

As previously discussed, the State of Montana takes the position the "physicians only" provision embodies a reasonable attempt by the State of Montana to foster the health of a woman seeking an abortion. The ultimate inquiry, however, is whether the purpose or effect of the provision is to place a substantial obstacle in the path of a woman who chooses to exercise her right to seek an abortion before the fetus attains viability. *Casey*, 120 L.Ed.2d at 715.

Undoubtedly, as the history attendant to the Montana Legislature's enactment of Chapter 321 reflects, not all of the legislators voting in favor of Chapter 321 were motivated by a desire to foster the health of a woman seeking an abortion. At the same time, this court cannot usurp the function of the Montana State Legislature by assuming, as the plaintiffs ask it to do, that none of the individual legislators approving the passage of Chapter 321 was motivated by a desire to foster the health of a woman seeking an abortion. In ascertaining whether the "purpose" of Chapter 321 constitutes an undue burden on the right of a woman seeking an abortion, the court's inquiry is narrow in view of the fact that "the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." *Casey*, 120 L.Ed.2d at 720 (*citing, Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955)). There exists insufficient evidence in the record to support the conclusion the requirement that a licensed physician perform an abortion would amount, "in practical terms, to a substantial obstacle to a woman seeking an abortion." *Id.* Accordingly, it is unlikely that the plaintiffs will prevail upon their suggestion that the requirement constitutes an "undue burden" within the meaning of *Casey*.

C. EQUAL PROTECTION

The plaintiffs next challenge Chapter 321, and particularly the "physicians only" provision as violative of their right to equal protection of the law. Specifically, plaintiffs assert the "physicians only" provision operates

to discriminate on the basis of gender, in that it selectively removes from the scope of practice of physician assistants a health care service sought only by women. The plaintiffs bolster their position with the argument that physician assistants have authority under Montana law to provide certain medical treatments for men which pose greater health risks than first-trimester abortions do to women. The State of Montana characterizes the equal protection challenge as meritless.

The parties, as might be expected, disagree upon the appropriate standard of scrutiny to which the "physicians only" provision of Chapter 321 should be subjected. The plaintiffs argue that because the provision is a gender-base restriction, the State of Montana bears the burden of showing "an exceedingly persuasive justification" for the classification. *Mississippi University of Women v. Hogan*, 458 U.S. 718, 724 (1982). Under this burden, the State is required to show "at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.' " 458 U.S. at 724 (citations omitted). The State of Montana argues persuasively, however, that the higher level of scrutiny suggested by the plaintiffs is inappropriate and that the validity of the "physicians only" provision is to be determined under the "rational basis" test.

The Supreme Court has consistently recognized that the statutory classification "neither proceeds along suspect lines nor infringes fundamental constitutional rights [,it] [sic] must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

F.C.C. v. Beach Communications, Inc., 113 S.Crt. 2096, 2101 (1993). Consistent with its argument pertaining to the "undue burden" analysis, the State reiterates the well-recognized proposition that the State has a legitimate interest in preserving potential life and protecting maternal health; a proposition recognized in *Roe v. Wade* itself and in subsequent cases dealing with the regulation of abortion procedures. *See, Beal v. Doe*, 432 U.S. 438, 445 (1976) (state interests described as "valid and important"); *Harris v. McRae*, 448 U.S. 297, 324 (1980) (state's interest described as "important and legitimate"); *Casey*, 120 L.Ed.2d at 711 ("the state has legitimate interest from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child").

A review of the many abortion regulation cases decided by the Supreme Court reflect the Court has ordinarily reviewed the challenged regulations under the rational basis test. Of particular importance is the Court's decision in *Bray v. Alexandria Women's Health Clinic*, 122 L.Ed.2d 34 (1993), wherein the Court rejected the claim that 42 U.S.C. § 1985(3) provides a federal cause of action against persons obstructing access to abortion clinics. In reaching its decision, the Court observed that opposition to voluntary abortion could not constitute invidious discrimination against women as a class. *Id.*

As a practical matter, the plaintiffs' equal protection challenge, when analyzed under the rational basis test, will rise or fall with its "undue burden" challenge. If the court determines that the "physicians only" provision constitutes an impermissible obstacle to the right of a

woman to obtain a previability abortion, it would necessarily follow that there would exist no rational basis for the classification.

D. BILL OF ATTAINDER

Article I, section 10, paragraph 1 of the Constitution prohibits States from enacting laws in the form of retroactive legislation that imposes punishment on specific individuals, laws commonly referred to as "Bills of Attainder." The plaintiffs argue the "physicians only" provision is, in its essence, a Bill of Attainder designed to impose retroactive punishment upon plaintiff Susan Cahill for her having provided abortion services.[4] The plaintiffs argue the "physicians only" provision is punitive in nature because it inflicts punishment upon Cahill through the destruction of the practice she has developed over time.

In assessing whether a particular legislative act is violative of the Bill of Attainder Clause, the Supreme Court has "applied a functional test of the existence of punishment, analyzing whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive

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[4] The Bill of Attainder provision of the Constitution proscribes any legislative act "no matter what [its] form, that applie[s] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States v. Lovett*, 328 U.S. 303, 315 (1946). As noted, Susan Cahill is the only physician assistant-certified who presently performs abortions in the State of Montana.

legislative purposes. (citations omitted). Where such legitimate legislative purposes do not appear, it is reasonable to conclude that punishment of individuals disadvantaged by the enactment was the purpose of the decision makers." *Nixon v. Administrator General Services*, 433 U.S. 425, 475-76 (1977). As previously discussed, the "physicians only" provision can be said to reasonably further a non-punitive legislative purpose, *i.e.*, fostering the health of a woman seeking an abortion. Consequently, it is unlikely that the plaintiffs will prevail in their suggestion that under the "functional" test, the provision constitutes an impermissible Bill of Attainder.

The second aspect of the plaintiffs' challenge based upon the Bill of Attainder Clause focuses upon the "motivational" test discussed in *Nixon*, which is described as follows: "inquiring whether the legislative record evinces a [legislative] intent to punish." 433 U.S. at 478. Application of this test requires the court to review, in detail, the legislative record attendant to the enactment of Chapter 321. The determinative inquiry is whether the legislative record reflects the existence of an intent to punish Cahill for her past conduct in performing abortions as opposed to the legitimate legislative intent to regulate the performance of abortion services in the State. In judging the constitutionality of Chapter 321, the court may only look to its terms, to the intent expressed by the members of the Montana Legislature who voted its passage, and to the existence or non-existence of a legitimate explanation for its apparent effect. *Nixon*, 433 U.S. 484. While the court will conduct an extensive review of the legislative history attendant to the passage of Chapter 321, it is simply unpersuaded, at this point, that the

plaintiffs will prevail upon the merits of this aspect of their argument, or that the hardships attendant the court's decision not to preserve the *status quo* is decidedly tipped in the plaintiffs' favor.

Therefore, for the reasons set forth herein,

IT IS HEREBY ORDERED that the plaintiffs' motion for preliminary injunctive relief is GRANTED to the extent the State of Montana, its agents and employees, are enjoined from enforcing Mont. Code Ann. § 50-20-109(1)(b) and Mont. Code Ann. § 50-20-109(4) as amended by Chapter 321, Section 2 of the Montana Session Laws (1995).

The plaintiffs' motion for preliminary injunctive relief is, however, DENIED to the extent it seeks to preclude the State of Montana from enforcing Mont. Code Ann. § 37-20-103 and Mont. Code Ann. § 50-20-109(1)(a) as amended by Chapter 321, Sections 1 and 2 of the Montana Session Laws (1995).

The parties are advised that the court shall forthwith enter a schedule for the final disposition of this action.

The Clerk of Court shall immediately notify the parties as to the entry of the present order.

DATED this 29th day of September, 1995.

/s/ Paul G. Hatfield
PAUL G. HATFIELD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JAMES H. ARMSTRONG, M.D., et al., Plaintiffs-Appellants, vs. JOSEPH MAZUREK, Attorney General of the State of Montana, Defendant-Appellee.	No. 95-35962 D.C. No. CV-95-83-PGH ORDER (Filed Oct. 24, 1996)

Before: PREGERSON, CANBY and HAWKINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

CHAPTER NO. 321

[HB 442]

AN ACT CLARIFYING THAT ONLY A PHYSICIAN MAY PERFORM AN ABORTION; AND AMENDING SECTIONS 37-20-103 AND 50-20-109, MCA.

Be it enacted by the Legislature of the State of Montana:

Section 1. Section 37-20-103, MCA, is amended to read:

"**37-20-103. Limitations on Authority conferred – exception.** Except as provided in 37-10-102, nothing in this chapter may be construed to authorize a physician assistant-certified to perform those functions and duties specifically delegated by law to persons licensed as optometrists, as defined under Title 37, chapter 10. *A physician assistant-certified may not perform an abortion.*"

Section 2. Section 50-20-109, MCA, is amended to read:

"**50-20-109. Control of practice of abortion.** (1) ~~No~~ *An* abortion may *not* be performed within the state of Montana:

(a) except by a licensed physician;

(b) after the first 3 months of pregnancy, except in a hospital licensed by the department;

(c) after viability of the fetus, unless in appropriate medical judgment, the abortion is necessary to preserve the life or health of the mother.

(2) an abortion under subsection (1)(c) may only be performed if:

(a) the foregoing judgment of the physician who is to perform the abortion is first certified in writing by ~~him~~ *the physician*, setting forth in detail the facts *relied* upon ~~which he relies~~ in making ~~such~~ *the* judgment; and

(b) two other licensed physicians have first examined the patient and concurred in writing with ~~such~~ *the* judgment. The ~~foregoing~~ certification and concurrence *in this subsection (2)(b)* is not required if a licensed physician certifies *that* the abortion is necessary to preserve the life of the mother.

(3) The timing and procedure used in performing an abortion under subsection (1)(c) of this section must be such that the viability of the fetus is not intentionally or negligently endangered, as the term "negligently" is defined in 45-2-101(37). The fetus may be intentionally endangered or destroyed only if necessary to preserve the life or health of the mother.

(4) ~~No~~ *A* physician, facility, or other person or agency ~~shall~~ *may not* engage in solicitation, advertising, or other form of communication ~~having~~ *that has* the purpose of inviting, inducing, or attracting any person to come to ~~such~~ *the* physician, facility, or other person or agency to have an abortion or to purchase abortifacients.

(5) The utilization plan of a physician assistant-certified may not provide for performing abortions.

(~~5~~)*(6)* Violation of subsections (1), (2), ~~and~~ (3) *and (5)* ~~of this section~~ is a felony. Violation of subsection (4) ~~of this section~~ is a misdemeanor."

Approved April 3, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JAMES H. ARMSTRONG, M.D.; MARK MILES, M.D.; SUSAN WICKLUND, M.D.; SUSAN CAHILL, P.A.; MARY STRANAHAN, D.O.; BETH E. THOMPSON, M.D.; and EDWIN L. STICKNEY, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada and on behalf of a class of performing and referring physicians, Plaintiffs, v. JOSEPH MAZUREK, in his official capacity as Attorney General of the State of Montana, Defendant.	Cause No. CV 95-083-GF-PGH **ORDER GRANTING INJUNCTION PENDING APPEAL** (Filed '96 Nov. 5)

Upon stipulation of the parties, and good cause appearing,

IT IS HEREBY ORDERED that the parties' request for an order granting an injunction pending appeal pursuant to Fed. R. Civ. P. 62(c) is GRANTED on the following terms:

1. The injunction shall apply only to Plaintiff Susan Cahill and will allow her to practice under those terms in effect prior to October 1, 1995. Plaintiff Cahill must be supervised by a licensed physician and shall operate under the physician assistant-certified utilization plan previously approved by the Montana State Board of Medical Examiners that includes the performance of abortions pursuant to the provisions of Mont. Code Ann. Title 37, chapter 20. No other physician assistants-certified will be allowed to perform abortions in Montana under the terms of this stipulation or the Court's order.

2. This injunction pending appeal will continue through the disposition of the Plaintiffs' request for preliminary injunction, and no hearing on the motion for preliminary injunction will take place until after disposition of the Defendant's petition for writ of certiorari.

Dated this 4 day of November, 1996.

/s/ Paul G. Hatfield
PAUL G. HATFIELD
United States
District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

JANE DOE, et al., Plaintiffs, -v- TOM ESCH, et al., Defendants.	)))))))	Cause No. CV-93-060-GF-PGH JUDGMENT (Filed Nov. 26, 1993)

Pursuant to the parties Stipulation for Judgment which the Court has reviewed and found proper,

It Is Hereby Ordered and Adjudged:

That the Defendants, their agents, employees, successors in office, attorneys, and those persons in active concert or participation with them are hereby enjoined from enforcing the provisions of Mont. Code Ann. § 50-20-109(1)(b) against the Plaintiffs with respect to any abortion performed through the second trimester, as measured by the woman's last menstrual period, on the ground that the abortion was not performed in a licensed hospital.

That the Defendants, their agents, employees, successors in office, attorneys, and those persons in active concert or participation with them are enjoined from enforcing the provisions of Mont. Code Ann. § 50-20-109(1)(a) with respect to a physician assistant-certified who is supervised by a licensed physician, has been approved for such status by the Montana State

Board of Medical Examiners, and has received Board approval of a physician assistant-certified utilization plan that includes the performance of abortions.

That the Defendants shall tender to Plaintiff Armstrong the sum of $33,500 in full discharge of any claim for damages under 42 U.S.C. § 1983 or Montana law and/or for attorney's fees and costs under 42 U.S.C. § 1988, which he or other plaintiffs herein have or could have asserted against the Defendants with respect to application of or prosecution under the Montana Abortion Control Act.

DATED at Great Falls, Montana this 26 day of Nov, 1993.

/s/ Paul G. ~~Hatfield~~
District Judge

I attest that this is a true copy of an original document held by the Montana State Archives.

/s/ Kathryn Otto
State Archivist

MINUTES

MONTANA HOUSE OF REPRESENTATIVES
54th LEGISLATURE – REGULAR SESSION

COMMITTEE ON HUMAN SERVICES & AGING

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 10, 1995, at 3:00 p.m.

ROLL CALL

Members Present:

Rep. Duane Grimes, Chairman (R)
Rep. John C. Bohlinger, Vice Chairman (Majority) (R)
Rep. Carolyn M. Squires, Vice Chairman (Minority) (D)
Rep. Chris Ahner (R)
Rep. Ellen Bergman (R)
Rep. Bill Carey (D)
Rep. Dick Green (R)
Rep. Antoinette R. Hagener (D)
Rep. Deb Kottel (D)
Rep. Bonnie Martinez (R)
Rep. Brad Molnar (R)
Rep. Bruce T. Simon (R)
Rep. Liz Smith (R)
Rep. Susan L. Smith (R)
Rep. Loren L. Soft (R)
Rep. Kenneth Wennemar (D)

Members Excused: None

Members Absent: None

Staff Present: David Niss, Legislative Council
Jacki Sherman, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	HB 442
Executive Action:	HB 406 TABLED
	HB 328 TABLED
	HB 236 TABLED
	HB 436 DO PASS AS AMENDED
	HB 435 TABLED
	HB 442 DO PASS

(Tape: 1; Side: A; Approx. Counter: 000; Comments: n/a.)

HEARING ON HB 442

Opening Statement by Sponsor:

REP. SUSAN SMITH, HD 84, Kalispell, stated that HB 442 would clarify that only a physician could perform an abortion. She felt that physician assistants were not qualified enough to perform the complicated procedure. She described the levels of medical care that a physician assistant is allowed to perform. **EXHIBITS 1 and 2**

Proponents' Testimony:

Tim Whalen, Montana Right to Life, EXHIBITS 3 and 4

Nancy Vigel, Montana Right to Life, gave personal testimony about when she had an abortion at age 15 and how

badly she was treated physically and emotionally by the physician assistant.

(Tape: 1; Side: A; Approx. Counter: 715; Comments: NA.)

Arlette Randash, Eagle Forum, quoted the Montana Code Annotated 50.20.109 which states that in order to protect the well-being of the mother, no abortion will be performed in the state except by a licensed physician. She felt the state has lacked the will to uphold the law which would aim to guarantee the quality of medical care.

Sharon Hoff, Montana Catholic Conference, felt that the safely [sic] of women are at risk, with a 2% rate of uterus perforation nationwide with about 63 occurrences in Montana in 1993.

Laurie Koutnik, Executive Director of Montana Christian Coalition, said the abortion procedure should be reserved for those who are professionally trained. She read testimony from a woman who had an abortion and was physically and emotionally abused by a physician's assistant. **EXHIBIT 5**

(Tape: 1; Side: B; Approx. Counter: 00; Comments: NA.)

Charles Lorentzen, Kalispell, stated that there are controls on asbestos, water and air quality and airlines for health and safety reasons. He said that because abortion would not affect many people in the committee room the safety issue has been looked over. If abortion was more real in their own lives they would worry more about the safety. Other professionals in other areas are required to be qualified for the work they do and abortionists should be too.

(Tape: 1; Side: B; Approx. Counter: 287; Comments: NA.)

Opponents' Testimony:

Scott Crichton, Executive Director of the American Civil Liberties Union (ACLU) of Montana. EXHIBIT 6

Janet Crepps, attorney for the Center for Reproductive Law and Policy, Colorado, represented abortion providers in Montana in the challenge to the committees of the Abortion Control Act that require abortions to be performed before the first trimester in a hospital. She felt that if HB 442 was passed and enacted it would be subject to challenge and be found unconstitutional under both the state and federal constitutions. The Montana Constitution contains an explicit right of privacy which will be protected in the area of abortions. She stated that there was no medical evidence that showed more complications from abortions performed by physician assistants than by physicians.

(Tape: 1; Side: B; Approx. Counter: 633; Comments: NA.)

Testimony was read on behalf of **Jennifer Krueger, President of the Montana Academy of Physician Assistants,** by a woman named Lee whose last name was not audible on the tape. **EXHIBIT 7**

Sarah Holmes read testimony on behalf of **Mindy Opper, Physician Assistant-Certified, Missoula. EXHIBIT 8**

(Tape: 1; Side: B; Approx. Counter: 860; Comments: NA.)

Eliza Frazer, Executive Director of the Montana Affiliate of the National Abortion and Reproductive Rights Action League, stated that there was no medical basis for HB 442 and that the bill was political, not medical. She quoted and explained statistics from the American Journal of Public Health. **EXHIBIT 9**

Kate Cholewa, Montana Women's Lobby, stated her concern that women have access to safe reproductive care. She opposed the bill because it did not seem to be based on any evidence of malpractice.

(Tape: 2: Side: A; Approx. Counter: 00; Comments: NA.)

She stated that the entire profession should not be attacked on the basis of a few bad experiences.

Vickie Amundson, Montana Business and Professional Women, felt that since there was not any medical reason why physician assistants could not perform abortions, HB 442 would just be another obstacle to affordable health care for women.

REP. CAROLYN SQUIRES read testimony on behalf of the **American Academy of Physician Assistants, Virginia. EXHIBIT 10**

James S. Bonnet, M.D., President-Elect, Montana Board of Medical Examiners, submitted a letter opposing HB 442. **EXHIBIT 11**

Informational Testimony: None

(Tape: 1; Side: A; Approx. Counter: 124; Comments: NA.)

Questions from Committee Members and Responses:

REP. BRAD MOLNAR asked if there would be any constitutional implications to the bill and **Ms. Crepps** replied that under the Undue Burden Standards established by the Supreme Court a bill will be invalid if it has any purpose or effect of placing a substantial obstacle in the path of women seeking an abortion based on the lack of medical evidence.

REP. MOLNAR asked for clarification on what other states allow. **Ms. Crepps** explained that are other states that have schemes that allow physician assistants to perform certain levels of service with a doctor present.

REP. MOLNAR stated that the legislature and not the boards has dictated who may provide certain services in the State of Montana. He said that currently the law says that only a physician may perform an abortion. **Ms. Crepps** replied that there was not evidence that physician assistants were incompetent to perform abortions.

REP. MOLNAR clarified the statistics that were presented by **Ms. Frazer.**

(Tape: 2; Side: A; Approx. Counter: 432; Comments: NA.)

REP. LIZ SMITH stated that after approval by the board physician assistants are allowed to practice under the supervision of a doctor and asked what level of education are physician assistants required to have. **Marise K. Johnson, MD, Kalispell,** answered that there are various programs with a variety of background training, but they all have to document procedures in order to get privileges through the Board of Medical Examiners.

REP. L. SMITH asked for clarification as to why only two states allow physician assistants to perform abortions. **Ms. Crepps** replied that the physician assistant scheme has not been set up to allow them to do that level of medical procedure.

(Tape: 2; Side: A; Approx. Counter: 668; Comments: NA.)

REP. SQUIRES said that the doctor has the duty to delegate responsibilities to physician assistants that they were

qualified to do and would supervise them, getting rid of one if he did not meet up to standards.

REP. SQUIRES asked **Susan Russell, Board of Medical Examiners,** if the procedures that are involved in performing abortions are within the scope and practice for a physician assistant. **Ms. Russell** stated that she had a copy of the Standard Physician Assistant Utilization plan and that plan was established between the physician and physician assistant and is examined by the Board of Examiners to ensure they are in compliance.

REP. SQUIRES asked if Dr. Armstrong and Ms. Cahill were under such a plan and if there was a problem with that plan or any complaints filed. **Ms. Russell** replied that they were under a plan and there were no problems and no disciplinary charges brought against either individual.

REP. BONNIE MARTINEZ asked **Ms. Crepps** if there was anything in the law that says that the physician assistants can perform abortion services if that assistant informs the patient prior to the service.

(Tape: 2; Side: B; Approx. Counter: 00; Comments: NA.)

Ms. Crepps replied that she could answer how it goes for Dr. Armstrong's clinic, which may be different than the requirements of the law. Someone could request Dr. Armstrong if they choose or they could be treated by either one if they do not express a preference.

REP. MARTINEZ stated that she thought a patient should be informed of that information before they make a decision about who they want to see. **Ms. Crepps** said if that is an appropriate procedure then the committee

should consider that as an amendment, but not to isolate abortion as one procedure not to be performed by the assistant because of that problem.

REP. LOREN SOFT asked according to Montana Code 50.20.109 who can perform abortions and what was the legislative intent when that law was put on the books. **Ms. Crepps** responded the abortions shall be performed by physicians. She thought the intent under section 109 was to ensure that incompetent non-physicians were prohibited from performing abortions and that when the Physician Assistant Statute was enacted the intent was to provide greater access to competent medical care.

REP. SOFT followed up by clarifying that as time changes so does the legislative intent and asked why the abortion control act was not enforced. **Ms. Crepps** responded that several provisions of the abortion control act are currently unenforceable because they are unconstitutional or there was an agreement not to enforce the provision.

REP. SOFT asked for examples of comparable levels of elective procedures. **Ms. Crepps** answered that the level of pain medication involved would be a consideration.

REP. SOFT asked **Mr. Whalen** his opinion on the abortion control act. He replied that the reason the act was not enforced was that the attorney general of Montana was in favor of abortion and it was a political decision.

REP. SOFT asked about the unconstitutionality of section 4 of the bill. **Mr. Whalen** said that the bill did not address the advertising issue.

REP. SOFT asked **Mr. Whalen** if he was aware of any other states that allowed physician assistants to perform abortions and he said no, not besides Vermont.

REP. L. SMITH asked for a copy of the utilization plan for physician assistants and **Ms. Russell** said she had a copy of the document and would answer questions from it.

Lance Melton, attorney for the Department of Commerce, listed and explained a few of the procedures that physician assistants were allowed to perform.

(Tape: 2; Side: B; Approx. Counter: 407; Comments: NA.)

REP. SQUIRES clarified that in the standardized plan abortion was being singled out from all the other services a physician assistant can perform to the uterus. **Mr. Melton** agreed.

REP. BRUCE SIMON asked **Mr. Crichton** how many other parts of the abortion control act he thought were unconstitutional. He responded that he was not prepared to answer to all the sections, but his concern involved opening up minor changes in the part of the law that was not enforced.

REP. SIMON stated that when an amendment was completed in a section of the law, the entire section is reprinted, and that the reason the state has chosen not to enforce all sections of the abortion control act was because they would be subject to constitutional challenge. **Mr. Crichton** agreed.

REP. SIMON stated that under the plan physician assistants were able to give treatment and basic procedures and asked how much was allowed regarding surgery. **Mr.**

Melton explained that according to the statute 37.20.403 a physician assistant can act in the stead of a physician if supervised by a licensed physician, is licensed by the Board of Medical Examiners and has received Board approval of a physician assistant-certified utilization plan. A health care provider shall consider the instructions of the physician assistant-certified as being the instructions of the supervising physician as long as the instructions concern the duties delegated to the physician assistant-certified under the utilization plan.

Mr. Melton referred to the plan and explained that physician assistants can administer treatment that would involve minor surgical techniques, and those were listed in the plan under section 37.20.301 and subsection 3.

(Tape: 3; Side: A; Approx. Counter: 00; Comments: NA.)

REP. MARTINEZ asked if the patient was not informed of the choice of providers and received treatment from a physician assistant would the patient be charged for the physician's service. **Dr. Johnson** answered that physician assistants do not charge as much as a physician for the same services given and would prefer the patient be informed as to their choices of medical providers.

REP. SOFT again asked for an idea of an elective procedure similar to abortion and **Mr. Melton** referred him to page 16 of the utilization plan.

(Tape: 3; Side: A; Approx. Counter: 200; Comments: REP. MOLNAR made comments and asked questions that were not audible on the tape.)

REP. SQUIRES asked the Board's position on statutory authority. **Mr. Melton** replied that they do have authority

and gave a few specific examples including section 37-20-202 and 37-20-301 which clarified the Board's authority.

REP. SQUIRES asked how long the utilization plan was and did some services overlap. **Mr. Melton** replied that the plan was 24 pages and is on record with the Board of Medical Examiners.

REP. MOLNAR asked what the intention of HB 422 was. **REP. S. SMITH** responded that the intent was to protect women who are seeking a legal abortion from possible complications and the way to ensure that was to provide the most qualified accessible medical care possible. Abortion is an elective procedure and not an emergency situation.

REP. MOLNAR asked if **REP. S. SMITH** would be willing to add an amendment (inaudible) and she said it would be a good idea.

REP. BILL CAREY asked the sponsor to look at the study from Vermont where the physician assistants outnumber the physicians and the care from the assistants is better than that from the physicians. He asked why the statements from the opponents were not taken into consideration. **REP. S. SMITH** went back to the utilization plan which limited the scope of the physician assistants and stated that they were not medically qualified to perform abortions.

REP. CAREY stated that patients were being denied access to medical care in their area and **REP. L. SMITH** said that rather than have someone in their area who is

under-qualified do the procedure they would be referred to the nearest physician.

REP. L. SMITH asked **REP. S. SMITH** if she was aware of variances in other states as to the background training and qualifications for physician assistants. She replied that the qualifications varied from state to state, with some requiring a four-year degree and some only two years.

REP. L. SMITH asked if a registered nurse would be more qualified that a physician assistant. **REP. S. SMITH** explained that physician assistants were more trained in the area of diagnosis than in actual care as nurses are.

REP. L. SMITH made the observation that the reason the physician assistants in Vermont have a better record than physicians of medical care regarding abortions could be because the physician assistants provide care for the routine abortions and the physicians take care of the higher risk situations where more complications could occur and a greater level of expertise would be needed. **REP. S. SMITH** agreed.

REP. SOFT read portions of the Vermont study in the plan that stated that little is known about the complication rates of abortions performed by physician assistants. **REP. S. SMITH** stated that not a lot could be based on those statistics in that area.

(Tape: 3; Side: A; Approx. Counter: 882; Comments: NA.)

Closing by Sponsor:

REP. S. SMITH emphasized that HB 442 was a bill about women's health and safety, not an anti-abortion bill and not an access bill.

(Tape: 3; Side: B; Approx. Counter: 00; Comments: NA.)

She quoted President Clinton who stated that "abortion should be safe, legal and rare." She added that abortion was legal, may never be rare, but that abortion should be kept as safe as possible.

EXECUTIVE ACTION ON HB 442

Motion: REP. KEN WENNEMAR MOVED THAT HB 442 DO PASS.

Discussion:

REP. LOREN SOFT reiterated the importance of maintaining the safety of the mother in the abortion procedure.

Vote: The motion carried 10-6 with REPS. SQUIRES, CAREY, HAGENER, KOTTEL, SIMON and WENNEMAR voting no.

I attest that this is a true copy of an original document held by the Montana State Archives.

/s/ Kathryn Otto
State Archivist

MINUTES

MONTANA SENATE
54th LEGISLATURE – REGULAR SESSION

COMMITTEE ON PUBLIC HEALTH, WELFARE & SAFETY

Call to Order: By **CHAIRMAN JIM BURNETT,** on March 10, 1995, at 3:25 PM

ROLL CALL

Members Present:
Sen. James H. "Jim" Burnett, Chairman (R)
Sen. Larry L. Baer (R)
Sen. Sharon Estrada (R)
Sen. Arnie A. Mohl (R)
Sen. Mike Sprague (R)
Sen. Terry Klampe (D)

Members Excused: Sen. Steve Benedict, Vice Chairman (R)
Sen. Dorothy Eck (D)
Sen. Eve Franklin (D)

Members Absent: None

Staff Present: Susan Fox, Legislative Council
Karolyn Simpson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:
Hearing: HB 442
Executive Action: HB 121

(Tape: 1; Side: 1)

HEARING ON HB 442

Opening Statement by Sponsor:

REP. SUSAN SMITH, HD 84, E. Kalispell, said the abortion debate began 22 years ago in the United States and has polarized many in the communities. The emotional level continued to escalate, the leaders of Choice are profoundly for choice, and the leaders of Life defend life, with the loss from the debate being the health of the ones who have been the focal point of the debate, women. This bill is being presented because it is a health and safety issue. Abortion is a serious surgery from which serious complications can arise, but it has not always been treated as such. At present, Montana is the only state, other than Vermont, that allows Physician's Assistants to perform abortions.

Abortion is called a blind, invasive procedure. She read portions of letters from 2 physicians saying abortions are above the level of expertise of Physician's Assistants. She read a few procedures listed in the Montana Board of Examiners Physician's Assistants Utilization Plan, Level III procedures which are to be performed only in the physical present of a physician.

She said an abortion is far more serious than the procedures listed in the Level III procedures.

Proponents' Testimony:

TIM WHALEN, representing Montana Right to Life Association, spoke briefly from written testimony in support of HB 442. He talked about the conflict in the law for Physician Assistants.

EXHIBIT 1 and 2.

Dr. Robert St. John, OB/GYN specialist, Butte, spoke in support of HB 442. During his 3-year training in California at Kaiser Foundation Hospital, he took care of many women who had complications from abortions. In addition to taking care of those complications, he was trained in the abortion procedure. In his Butte practice, he sees about 5-6 women per year who he has to admit to the hospital due to acute complications from abortions. The biggest problem he has seen over the years are chronic complications, and they are becoming an increasing problem as he sees women coming back who are irreversibly sterilized from the procedures. About a year ago he saw a 19-year old and a 21-year old women who were sterile, and the only thing in both their medical histories was having had an abortion.

He said it is a very difficult, complex procedure and without expertise, there can be serious complications. He said, as an OB/GYN specialist, he had 12 years of training learning how to do these kinds of procedures, and surgery can't be learned in a 1 or 2-year course. Without the proper training, doing a major operation like abortion can lead to complications and side effects. There isn't good data in the US, but European literature has documented abortion and complication information. In the Iron Curtain Countries, there was socialized medicine and they had few complications because of the police state, which forced them to see the physician for followup for a 100% recall rate, so they knew what their complication rate was. If these physicians were well trained and had been doing these procedures for a long time, the incidence of hemorrhage was 2%, if they were relatively

poorly trained or inexperienced, there was a 15% hemorrhage rate. Hemorrhage is defined as serious enough to require a blood transfusion.

He said 15% of the 1,600,000 women in the United States having transfusions, which increases their risk for Hepatitis B and AIDS. If only 2% or 32,000 require a blood transfusion, that's a small complication rate. The big complication rate is infection and 25% (400,000) of women who have an abortion will show evidence, sometime in her life, that she had an infection at the time of the abortion. He said there are many other complications, which he talked about.

He then listed and talked about some of the Level III procedures that Physician's Assistants can do. He said the abortion procedure is dangerous, risky and has a high incidence of complications.

Laurie Koutnik, Executive Director, Christian Coalition, spoke in support of HB 442. She said it is common sense legislation, and it is wise to promote health for the citizens of Montana. She read a letter from a young woman, from Kalispell, who had an abortion. **EXHIBIT 3.** She said abortion should only be in the hands of responsible, certified doctors.

Sharon Hoff, representing the Montana Catholic Conference, read her written testimony in support of HB 442. **EXHIBIT 4.**

Arlette Randash, Eagle Forum, read her written testimony in support of HB 442. **EXHIBIT 5.**

Charles Lorentzen read his written testimony in support of HB 442. **EXHIBIT 6 A-D.**

Tammy Skogan, Ronan, spoke in support of HB 442. She said abortion is a major surgical procedure that men don't have to be worried about, it seems like have women have lesser quality for a major medical procedures, and no one in the Committee room would accept the lower quality of medical care for a major medical procedure. She urged the Committee to support HB 442, for quality, not equality.

Opponents' Testimony:

Jennifer Krueger, President, Montana Academy of Physician Assistants, spoke from her testimony in opposition to HB 442. **EXHIBIT 7 and 8.**

Simon Heller, Attorney, Center for Reproductive Law & Policy, New York, said he currently represents abortion providers in Montana. He spoke from written testimony in opposition HB 442. **EXHIBIT 9.** He said he wanted to address the legal issues raised by HB 442 and if HB 442 passes, it will be challenged in court.

Mindy Opper, Physician Assistant, Missoula, spoke in opposition to HB 442. She is concerned this bill presents another barrier to access to women seeking abortions in Montana, and concerned about questions raised about the quality of care offered by Physician Assistants. She talked about a study, done by the Vermont Department of Health in 1986, comparing complication rates from first trimester abortions performed by M.D's and P.A's. She said this study and others confirm the quality of care offered by Physician Assistants, in all realms of health care they provide, is equal to the care provided by physicians. She said the P.A.'s in Montana, as in Vermont, work

under the supervision of a physician and Physician Assistants' scope of practice is limited. She talked about the education, continuing education, and Board requirements for Physician Assistants. **EXHIBIT 10.**

(Tape: 1; Side: 2)

Kity Rich, Big Fork, spoke in opposition to HB 442 and read a letter she had written to **SENATOR BAER. EXHIBIT 11.** She spoke in support of Physician Assistant Susan Cahill in Kalispell and said this bill is against everything in which she believes.

Kate Cholewa, Montana Women's Lobby, read her written testimony in opposition to HB 442, saying it is a bogus bill, and does not increase the safety of abortions. She said abortion is being singled out, and this bill is anti-choice agenda. She passed out Myths and Facts about abortion. **EXHIBIT 12 and 13.**

Debbie Dominique, Kalispell, spoke in opposition to HB 442. She said obtained an abortion from P.A. Susan Cahill in 1978 and another in 1980. She said Susan Cahill is her primary health care provider and has been happy with the care she has received, and thinks this bill is a personal attack on Susan Cahill.

Sue Juhl, Big Fork, spoke in opposition to HB 442. She said there are 2 sides to every issue and feels this bill is a personal attack on P.A. Susan Cahill.

Tracy Mayer, Kalispell, spoke in opposition to HB 442. She said the sponsors of this bill are disguising their efforts to decrease and end abortion as a health and safety issue, and there are no womens' safety concerns

with P.A.'s performing abortions. She talked about Physician Assistant State Boards and said this bill is about politics and the politics of abortion. She said when politicians are deciding who should be performing a medical procedure, under the guise of public health and safety, it's as though P.A.'s performing abortions represents a higher risk to the public. She talked about Susan Cahill being her health care provider.

Dr. Gordon Bell, Family Physician, Glasgow, said he was on the Board of Medical Examiners for 3 1/2 years and has been the supervising physician for 2 P.A.'s in Glasgow. He talked about Physician Assistants' training and the procedures they are qualified to do. He said the Physician Assistant training does not qualify them to do abortions, but they can get the extra training necessary, as has Susan Cahill, to be qualified.

Dr. James Bonnier, President, Board of Medical Examiners, said the Board does not have roll [sic] in nor takes a pro or con abortion stance, but the Board feels Physician Assistants are important health care providers in rural areas. It is important that the Board of Medical Examiners maintain its roll [sic] as a credentialling agent for health care providers. Both he and the Board is concerned this bill is a legislative move to isolate one group of health care providers, isolate people within that group, and to remove from those providers procedures and activities they are qualified to do. He said there is a supervising physician with every Physician Assistant and wants the Board to be able to review the credentials of each to health care provider, make judgements for the appropriate procedures for those providers, issue

licenses, and not single out a single group or issue that may have political, moral, or religious grounds.

Eliza Frazer, Executive Director, Montana NARAL, spoke in opposition to HB 442. **EXHIBIT 14.** She referred to Proponents' testimony talking about Nurse Practitioners providing abortions. She said they are not advocating any Nurse Practitioner or Nurse to perform abortions, and Physician's Assistants are different and is a different situation.

Randy Spear, Physician Assistant, Board of Medical Examiners member, spoke in opposition to HB 442. He talked about the procedures listed by **REP. SMITH** in her opening statement, and said there is nothing in the Physician Assistant's Utilization Plan that says a Physician must be present for clipping toe nails.

Susan Cahili, Physician Assistant, spoke in opposition to HB 442. She said she feels this bill is personally against her. She has worked with Dr. James Armstrong for 18 years and never has had a complaint lodged against her. She said she has been trained to do abortions.

Questions From Committee Members and Responses:

SENATOR KLAMPE asked **Jennifer Krueger** to give more information about the complications of abortions and the procedures that Physician Assistants are authorized to do.

Jennifer Krueger listed and described several procedures Physicians Assistants are allowed to do.

SENATOR KLAMPE asked about the supervision Physicians Assistants receive while working.

Jennifer Krueger said she practices under the supervision of a physician, but for various procedures, the physician may not present or even in the office.

SENATOR KLAMPE asked **Jennifer Krueger** if she performed abortions.

Jennifer Krueger said she does not perform abortions and deferred to **Susan Cahill.**

Susan Cahill said every Physician Assistant writes a Utilization Plan which must be accepted by the Board of Medical Examiners, and her Utilization Plan says she will never do an abortion unless Dr. Armstrong is present in the office at the same time.

SENATOR ESTRADA said she has read HB 442 and does not see Susan Cahill's name mentioned anywhere in the bill. She asked **Simon Heller** if he said this bill is directed at **Susan Cahill.**

Simon Heller said yes, it is directed at **Susan Cahill.**

SENATOR ESTRADA asked if there is only one Physician Assistant in Montana doing abortions.

Simon Heller said yes.

SENATOR SPRAGUE told **Susan Cahill** that he has to commend her and said he wants to be objective on this matter. He asked, if in her years of practice, has she had people protest at her practice.

Susan Cahill said there have been protestors at her office.

SENATOR SPRAGUE asked, as a Physician Assistant, was it a general degree, then concentrate on a particular field.

Susan Cahill said her field is in Family Practice with Dr. James Armstrong, and until 5 years ago, they delivered babies. She said doing abortions is only a part of her practice and she was hired by Dr. Armstrong because, when he performed abortions, there were so many that it took away from the other part of his practice.

SENATOR SPRAGUE asked to speak with the Legal Council for the Board of Medical Examiners.

Patricia England said she is the Legal Council [sic] for the Board of Medical Examiners.

SENATOR SPRAGUE asked if the Legislature had given the Board statutory rules to make decisions as to who could perform specific procedures.

Patricia England said in section 37-20-301, subsection 3 of the Montana Code, directs the Board to approve the Utilization Plan of Physician Assistants. As in the case of Susan Cahill and Dr. Armstrong, the Board found they were in the scope, training, and experience of practice.

SENATOR SPRAGUE asked for a copy of the Montana Code be submitted for the Committee members. Then he asked, legally, why this bill is here, isn't it really a legal question, an interpretation of the law, or is it an effort to develop law to interpret.

Patricia England said it is a legal question and, in time, will be addressed by the Board. She said there is a possible conflict between two laws and it will probably end up

in court for a decision. She read from the Brief for Summary Judgement of a lawsuit and the Montana Code Annotated section 50-20-1091A as defined by 37-20-4013. She said apparently the Attorney General also construed this statute as requiring the Board to approve a medical procedure that the 2 participants had demonstrated competency in.

SENATOR BURNETT said, as Legislators, bills are a response to public demands, and that's why there is legislation, and **REP. SMITH** was responding to her constituents.

SENATOR MOHL asked **Susan Cahill,** as an assistant, you said you never performed any abortions without Dr. Armstrong being present, and is that legal, and is that like a nurse assisting.

Susan Cahill said she is not a nurse, but is a Physician Assistant, has had training and does many of the same things medical doctors do and is always under the guidance of a supervising physician.

SENATOR MOHL asked if this is changed and whether a Physician Assistant can still perform certain procedure [sic] with the physician present.

Susan Cahill said if this law is passed, probably not.

SENATOR MOHL said, as he reads the bill, **Susan Cahill** can, at present, perform abortions without a licensed physician present, but if the bill passes, she could not.

Susan Cahill said she can't practice independently. There are guidelines in their Utilization Plan specifying what Physician Assistants can and can't do, either in the office

on their own or under the guidance of or with a physician. They also have their own Utilization Plan that is OK'd by the Board of Medical Examiners. She said she is authorized to do first trimester abortions with a supervising physician present in the office.

SENATOR ESTRADA asked **Susan Cahill** if when performing an abortion and there were complications, could she handle it or would she call for help.

Susan Cahill said if she has any problems, she calls Dr. Armstrong.

SENATOR ESTRADA asked if Dr. Armstrong is always in the office.

Susan Cahill said he is there all the time.

SENATOR BAER asked **Simon Heller** if he is a member of the bar and which state.

Simon Heller said he is a member of the bar in New York and the District of Columbia.

SENATOR BAER asked if he was engaged in the active representation of **Susan Cahill.**

Simon Heller said he is not currently representing **Susan Cahill,** but is representing other abortion providers in Montana.

SENATOR BAER asked if he is licensed to practice law in Montana.

Simon Heller said he is not licensed to practice law in Montana, but is practicing, at present, under a motion made to the State District Court, for a current case.

SENATOR BAER asked under whose supervision is he practicing.

Simon Heller said the local attorney is Bruce Measure.

SENATOR KLAMPE asked about the medical ramifications of this issue.

James Bonnier said he is appearing as the President of the Board of Medical Examiners and would like to limit his testimony to the process. He said he does not do primary care, abortions, or obstetrics.

SENATOR KLAMPE asked to speak to another physician. He asked **Dr. Gordon Bell** about the Proponents references to complications of abortion and about the risks of a first trimester abortions.

Dr. Bell said he is a primary care physician, has some familiarity with these procedures but does not perform abortions. He does a wide range of obstetrics and is familiar with the literature dealing with updated abortion issues, and thinks the numbers quoted are outlandish.

SENATOR KLAMPE asked **Dr. St.John** about the risk of convulsions and death from injecting into a vein or artery in a first trimester abortion.

Dr. St.John said injection of a local anesthetic into a vein can lead to convulsions. It is a heart stopper. In 1966, there were 289 deaths reported to the CDC and for the last 6-8 years in the United States, there have been 10-20 deaths reported from all causes.

SENATOR KLAMPE asked about data.

Dr. St. John said there are about 10-20 deaths per year from the complications of abortion, and adding pregnancy deaths, the figure is higher.

SENATOR KLAMPE said he wants to see some data on risks from complications.

Debra Frandsen, Executive Director, Planned Parenthood, Missoula, said in the past 20 years in Montana, since abortion has been legal in Montana, there have been no reported deaths from abortion. The average rate for complications is 1-2%. There have been 400 abortions at the Planned Parenthood clinic in Missoula, and have had no clients who needed a transfusion, and one woman was hospitalized for another cause, and have had no hospitalizations related to abortions. She said there are statistics to show abortion is a safe procedure, especially when performed in the first trimester of pregnancy, and is 10-14 times safer than delivering a baby.

SENATOR MOHL asked if the Board of Medical Examiners had been contacted by the podiatric group about extending their scope of practice to the ankle.

Dr. Bell said the Board of Medical Examiners heard some brief discussion on that subject, and had been informed there was Legislation introduced.

SENATOR MOHL asked if the Board of Medical Examiners made the decision that a physician has to be present when an abortion is performed, and why the Board doesn't make a decision about the podiatrists scope of practice.

Dr. Bell said the issue has not been brought before the Board. He said the Board deals with issues of a statutory

nature, and have been fulfilling the requirement of the law, given them by the Legislature, regarding Physician Assistants. They do not have statutes regarding whether podiatrists can approach and have not been asked for an opinion on that. They do have statutes on file dealing with Physician Assistants.

SENATOR SPRAGUE asked how many abortionists are in the State of Montana.

Dr. St. John said he didn't know.

Debra Frandsen said, there are about 8-10, but there are no figures from private clinics and practices, which provide the majority of the abortions in the State.

SENATOR SPRAGUE asked how many men and how many women were doing abortions.

Debra Frandsen said there are about 3-4 women and 6-7 men.

SENATOR BAER asked **REP. SMITH,** when she agreed to sponsor this bill, was there any conception on her part that it address any particular person or place.

REP. SMITH said the bill was addressing an access issue, and not anyone in particular.

SENATOR SPRAGUE asked if this bill was brought to her by someone or was it of her own creation.

REP. SMITH said **REP. DAN McGEE** was going to carry this bill, but she decided to do so. She said this bill is not person specific, but is a women's health issue.

SENATOR SPRAGUE asked how this bill came to be and how it developed.

REP. SMITH said Section 50-21-109 is the existing language. She read the version before it was changed, stating abortions can be performed in Montana only by a licensed physician.

SENATOR SPRAGUE said the Physician Assistant, **Susan Cahill,** is performing abortions and it's legal. He asked if there was another statute that makes it legal and illegal simultaneously.

REP. SMITH said it may fall under the category of rule-making authority.

SENATOR KLAMPE asked **Patricia England** to respond to the statute issue that abortion is an illegal act unless performed by a physician.

Patricia England said she is not an expert in this area of the law. She said there is tension because one law that says you can and another says you can't. As the Attorney General's statement in his brief and federal law states, she thinks the statement of restriction to physicians only cannot prevail.

SENATOR KLAMPE asked about the statute.

Dr. James Bonnier said he did not know, and is totally dependent on their counsel.

Simon Heller said in 1993, Chief Judge Hatfield of the United States District Court, signed an order stating that the "physician only" statute took out the reference to "physician's assistants" who were performing abortions under the supervision of a physician and under the utilization plan as approved by the Board, so the law saying physicians only doesn't mean any Physician Assistant could start performing abortions. That law is still in

effect, except as to those Physician Assistants who have proved themselves to the Board.

SENATOR KLAMPE asked **Tim Whalen** for his interpretation of the statute, and whether he disagreed with **Simon Heller.**

Tim Whalen said he does disagree with **Simon Heller.** He said it was stated that this law would be held unconstitutional in both Federal and State law. The Supreme court addressed the issue, whether the "physicians only" laws are constitutional, and it's felt they are constitutional. As far as Montana State Constitution, the abortion issue, under the privacy provision of the Montana State Constitution has never been addressed in Montana. Any statement made, with respect to how this issue would be dealt with, in his view, is complete speculation. He said talked about the current privacy provision in Montana law and about opinions at the Federal level, and the abortion right is on shifting ground.

Closing by Sponsor:

REP. SMITH referred to the Vermont study statistics stated in previous testimony, and to **Simon Heller's** statement that this bill was brought to the Legislature by the terrorists who burned the offices in Kalispell. She said she strongly objects to that inference because she had nothing to do about burning down a building, nor does she want to associate with anyone who does.

(Tape: 2; Side: 1)

She said this is about womens' health and is not an anti-abortion bill. She said abortion is legal in Montana and all

50 states. If the law is made more lenient because of access, there could be health care providers performing various procedures for which they are not trained. There needs to be access to quality health care. This is a womens' [sic] health and safety issue. She read a paragraph by Jane Hodgson, a doctor who does abortions. She said, "When I first started doing abortions, I took my Boards in Obstetrics and Gynecology. Therefore, I knew I was competent to do abortions. When I did my first few hundred, I realized how silly I had been in my previous view point. At this point, having done somewhere around 12,000 procedures, I'm beginning to think I'm reasonably competent. I don't think you can train someone to do first trimester procedures quickly." She quoted President Clinton saying abortions should be safe, legal and rare.

I attest that this is a true copy of an original document held by the Montana State Archives.

/s/ Kathryn Otto
State Archivist

MINUTES

MONTANA SENATE
54th LEGISLATURE – REGULAR SESSION

COMMITTEE ON PUBLIC HEALTH, WELFARE & SAFETY

Call to Order: By VICE CHAIRMAN STEVE BENEDICT, on March 15, 1995, at 3:00 PM

ROLL CALL

Members Present:

Sen. James H. "Jim" Burnett, Chairman (R)
Sen. Steve Benedict, Vice Chairman (R)
Sen. Larry L. Baer (R)
Sen. Arnie A. Mohl (R)
Sen. Mike Sprague (R)
Sen. Dorothy Eck (D)
Sen. Eve Franklin (D)
Sen. Terry Klampe (D)

Members Excused: Sen. Sharon Estrada (R)

Members Absent: None

Staff Present: Susan Fox, Legislative Council
Karolyn Simpson, Committee Secretary

Please Note: These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing:	**No bills**
Executive Action:	**HB 442, HB 504, HB 539, HB 557, SB 385, HB 121**

EXECUTIVE ACTION ON HB 442

SENATOR BENEDICT said there are no amendments to HB 442.

Motion: SENATOR KLAMPE moved HB 442 to be TABLED.

Discussion: SENATOR BENEDICT ruled that motion out of order. He said there should be some discussion by Committee members before tabling a bill.

SENATOR ECK said the Senate rules or procedures allow a discussion on a motion to table in committees, but not on the Floor.

SENATOR BENEDICT said the discretion if the Chairman applies as far as ruling a motion out of order.

SENATOR KLAMPE withdrew his Table motion.

Motion: SENATOR BAER moved HB 442 BE CONCURRED IN.

SENATOR KLAMPE said he has no problem with people either supporting or not supporting abortion bills, but this is not an abortion bill. He said the Proponents testimony mainly focused on whether abortion is good or bad, and there wasn't much scientific data presented. He said the bill deals with whether Physicians Assistants are capable of performing first trimester abortions, and it was verified in testimony the bill should be killed.

SENATOR MOHL said he has been a strong advocate for holding people to the line of what they have the education to do. He said he does not feel Physicians Assistants are not educated to do abortion procedures. For that reason he is in favor of the bill.

SENATOR BAER said this is a public health and safety bill and abortion issue is merely collateral, and not the focus of this bill. He said the current Statutes states only a licensed physician may perform an abortion procedure and the administrative rules would allow the Board to determine what procedures people are skilled and accredited to do, so there is a conflict between the law and the administrative rules. Whenever there is a conflict between laws and administrative rules, law will always preclude the administrative rules. He said that was the situation when the Attorney General's opinion was requested, but rather than respond to the situation at hand, he determined the designated physician also included Physicians Assistants, resulting in a controversy. He said the intent and purpose of HB 442 is to clarify this ambiguity by making it clear that Physicians Assistants may not perform abortions.

He related his working experience in the operating rooms of a military hospital, saying he could not envision an abortion type procedure being performed any place other than a hospital surgical suite with an operating surgical team available in case complications should arise. He said abortion is an intrusive procedure that should only be performed by a licensed physician with the knowledge and ability to handle the unexpected, and in a setting where the unexpected can be dealt with by accomplished and qualified people. He can't imagine this

procedure being done in a doctor's office by someone with less training than a physician.

SENATOR KLAMPE disagreed with **SENATOR BAER** saying, this bill didn't address venue, where these surgical procedures will take place, so that is not an issue. He said if the unexpected should arise, these people are qualified to handle most of these problems, plus there is direct supervision by a physician in the office. He said the record shows safety has been insured with these people's education and skills, and they are performing the procedure as well as physicians are.

SENATOR ECK said her concern is similar to that of **SENATOR MOHL**. She said there have been a lot of bills asking the Legislature to determine the scope of practice for given professions, and in this case, the responsibility has been place with the Board of Medical Examiners. She would prefer their making the decision for the scope of practice for Physicians Assistants.

SENATOR SPRAGUE said he thinks this bill is asking the Committee to reach back to say what you have been doing for several years is now improper and illegal. He said that is not right, but if this bill makes rules, conditions and credentials to be met, to apply "from this day forward," then that's fine. He said the Board of Medical Examiners needs to make this decision, and they are abdicating their responsibility by not doing so. If the intent of this bill is to set up new criteria to apply from this day forward, that's OK, but should not consider grandfathering is not right.

Motion/vote: SENATOR KLAMPE made a substitute motion to TABLE HB 442. The motion resulted in a TIE VOTE (by Roll Call).

Vote: The BE CONCURRED IN MOTION CARRIED with SENATORS SPRAGUE, ECK, FRANKLIN, and KLAMPE voting NO.

SENATOR BURNETT come in to the hearing.

SENATOR KLAMPE left his voting proxy with **SENATOR ECK** as he left the hearing.

No. 96-1104

Supreme Court, U.S.
FILED
MAR 28 1997
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

JOSEPH MAZUREK, in his official capacity as Attorney General of the State of Montana,

Petitioner,

—v.—

JAMES H. ARMSTRONG, M.D.; MARK MILES, M.D.; SUSAN WICKLUND, M.D.; SUSAN CAHILL, P.A.; MARY STRANAHAN, D.O.; BETH E. THOMPSON, M.D.; and EDWIN L. STICKNEY, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada and on behalf of a class of performing and referring physicans,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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36pp

QUESTION PRESENTED

Whether the court of appeals correctly directed the district court, in considering respondents' motion for a preliminary injunction against a Montana abortion statute, to balance the hardships between the parties, where the district court had failed to do so previously?

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Respondents James H. Armstrong, M.D., *et al.*, respectfully submit the following brief in opposition to the petition for certiorari filed by Joseph Mazurek, the Attorney General of Montana (hereinafter "petitioner" or "the State"), docketed on January 13, 1997.

OPINIONS BELOW

The opinion of the district court is reported at 906 F. Supp. 561 (D. Mont. 1995). The opinion of the court of appeals is reported at 94 F.3d 566 (9th Cir. 1996).

ADDITIONAL RELEVANT CONSTITUTIONAL PROVISION

Article I, Section 10 of the United States Constitution provides in relevant part:

> No State shall . . . pass any Bill of Attainder . . . .

COUNTERSTATEMENT OF THE CASE

This case was filed on July 31, 1995, as a constitutional challenge to Chapter 321 of the 1995 Montana Session Laws, passed as House Bill No. 442 (hereinafter "HB 442") by the Montana Legislature. HB 442 amended the Montana Abortion Control Act with three criminal restrictions on abortion: (1) a new, specific ban on the performance of abortions by physician assistants in Montana (and hence singling out respondent Armstrong as the only physician in Montana prohibited from utilizing a physician assistant for parts of his practice); (2) a requirement that abortions be performed in a licensed hospital "after the first 3 months of pregnancy;" and (3) and a prohibition on soliciting or advertising abortion. *See*

29a-30a.[1] In addition, HB 442 amended the 1983 Montana statutory scheme enabling physician assistants to perform certain approved medical procedures when licensed physicians apply to supervise them. *See* 29a (amending Mont. Code Ann. § 37-20-103).

On September 29, 1995, the district court granted plaintiffs' motion for a preliminary injunction against the second-trimester hospitalization requirement and the advertising ban. However, the district court severed the statute and denied a preliminary injunction against the ban on the performance of abortions by a physician assistant, writing:

> The court recognizes that the plaintiffs' challenge to the "physicians only" provision raises a serious question, but is not convinced that under [sic] the balance of hardships is such that the court must strike the balance in favor of the plaintiffs' request.

16a.

On appeal, the court of appeals agreed in part with the district court:

> [W]e conclude, as did the district court, that the appellants presented a "serious question" requiring a balancing of the hardships to determine the appropriateness of preliminary relief.

---

[1]Citations to the Petition are in the form "Pet. ___"; citations to its appendix are in the form "__a"; and citations to the appendix to this Brief are in the form "A-__." Citations to declarations filed in the district court are in the form "[Declarant's surname] Dec. ¶ __"; citations to depositions are in the form "[Deponent's surname] Dep. __."

7a. However, the court held that the district court did not comply with the Ninth Circuit's preliminary injunction standards because "[t]he district court . . . did not truly balance the hardships," 7a, and called special attention to the failure of the district court to "address the countervailing hardships to the State, or the absence of them." 8a. Accordingly, the court of appeals vacated the district court's decision and remanded for further proceedings. *Id.*

Petitioner's petition for rehearing was denied, and his suggestion for rehearing *en banc* was rejected, with no active judge of the court of appeals requesting a vote on whether to rehear the case *en banc*.

HB 442 is far more than a "physician only" abortion statute, as the State seeks to portray it. Beginning in 1977, respondent Cahill, a physician assistant-certified (P.A.) licensed to practice in Montana, has performed first-trimester abortions in Kalispell, Montana, under the supervision of plaintiff Armstrong, a physician licensed to practice medicine in Montana. Cahill Dec. ¶ 10. Since 1983, Cahill has performed abortions under a utilization plan approved by the Montana State Board of Medical Examiners ("the Board"), Cahill Dec. ¶ 8, which has likewise approved approximately ninety P.A.'s to work under various physicians performing some 200 procedures with varying degrees of supervision according to the procedures' risks. No disciplinary proceedings have ever been brought before the Board against P.A. Cahill, nor has she ever been sued for malpractice. Cahill Dec. ¶ 10. The licensing scheme for P.A.'s contains specific procedures to insure due process for P.A.'s before areas of their practice may be removed. *See* Mont. Code Ann. § 37-20-104.

Prior to enforcement of HB 442, P.A. Cahill performed the majority of first-trimester abortions at Dr. Armstrong's office; Dr. Armstrong performed some first-trimester abortions and all the second-trimester abortions. Cahill Dec. ¶ 12. Under the utilization plan approved and periodically re-approved by the Board for P.A. Cahill since 1983, Dr. Armstrong was required to be in the office and available to her while she was performing abortions. Cahill Dec. ¶ 10.

P.A.'s perform a critical public health function in Montana; they are authorized to perform a range of some 200 medical procedures and treatments, many of which pose greater health risks to patients than first-trimester abortions. For example, P.A.'s are authorized to prescribe virtually all medications, many of which have much higher complication (morbidity) rates and much higher mortality rates than abortion. Cahill Dec. Exh. D; Grimes Dec. ¶ 10. Also, P.A.'s are authorized to deliver babies even without a physician in the office, Cahill Dec. ¶ 10 & Exh. C, and childbirth involves mortality risks ten times that of first-trimester abortion. Grimes Dec. ¶¶ 7-8. By contrast, Ms. Cahill's state-approved utilization plan requires Dr. Armstrong to be in the office when she performs abortions. Cahill Dec. ¶ 10.

Abortion providers in Montana are a group that is hated and targeted by a segment of the public. Respondents Armstrong and Cahill -- along with other providers in Montana, such as respondent Wicklund -- have been targeted by anti-abortion activists, whose stated goal is to stop them from providing abortions. Armstrong Dec. ¶¶ 19-22; Wicklund Dec. ¶¶ 8-15. These activists have vilified them in newsletters and picketed them at their offices and church. Armstrong Dec. ¶ 19. The office in which Dr. Armstrong and P.A. Cahill practice was

destroyed by an unsolved arson, which Dr. Armstrong attributes to anti-abortion extremists. *Id.*

The impetus for the legislature to punish Ms. Cahill and Dr. Armstrong came only after attempts to have them prosecuted failed. Anti-abortion activists have also sought to stop Armstrong and Cahill from providing abortions by enlisting the assistance of Montana government officials. In 1992, anti-abortion representatives of the Montana Right to Life Association (MRTL) and Flathead Pro-Life (FPL) sought to have Armstrong and Cahill prosecuted for violating several provisions of the Montana Abortion Control Act. Arlette Randash (Executive Director of MRTL) and Charles Lorentzen (President of FPL) wrote to various government officials, asking them to investigate and prosecute plaintiffs Armstrong and Cahill. Randash asked the Montana Attorney General to "please investigate and inform me of what you find" regarding the performance of abortions by a physician assistant (plaintiff Cahill) working at Armstrong's office, allegedly in violation of Mont. Code Ann. § 50-20-109. Complaint Exh. C. Lorentzen claimed that Armstrong and Cahill were violating several provisions of Mont. Code Ann. § 50-20-109. He claimed that a letter sent by Armstrong to other physicians violated subsection 4's prohibition on "soliciting and advertising" abortions; that the performance of abortions by Cahill violated the "physician-only" provision of subsection 1(a); and that the performance of second-trimester abortions in Armstrong's office violated the "hospital-only" requirement of subsection 1(b). Complaint Exh. D.

None of the government officials contacted by Lorentzen informed him that the "soliciting and advertising" prohibition of the Montana Abortion Control Act had been permanently enjoined in 1976. Lorentzen Dep. at 44; *see Doe v. Deschamps*, 461 F. Supp. 682, 688-89 (D. Mont.

1976) (three-judge court) (enjoining solicitation prohibition). Nor did they inform him that the second-trimester hospitalization requirement of the Montana Abortion Control Act was unenforceable as a result of this Court's invalidation of similar statutes. Lorentzen Dep. 44; *see City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 438-39 (1983). Nor did the prosecutors recognize that Montana defined "licensed physician" as including physician's agents when it enacted the P.A. statute in 1983. Instead, County Attorney Esch ordered a criminal investigation of Armstrong and Cahill. Complaint Exh. G. That investigation was ended by the stipulated judgment entered by the district court in *Doe v. Esch*, No. 93-060-GF-PGH (D. Mont. Nov. 26, 1993) (judgment). *See* 33a-34a.

Frustrated by their failure to punish Armstrong and Cahill through the judicial process, the same anti-abortion activists turned to the Montana Legislature to punish Armstrong and Cahill. MRTL, through its lobbyist, Tim Whalen, drafted HB 442 and asked newly-elected Representative Susan Smith of Kalispell to sponsor the bill. Smith Dep. 15. She was promised documentation supporting the legislation's health basis, but never received such documentation, either before or after the bill was enacted. Smith Dep. 22-24. She stated that her reason for sponsoring HB 442 was MRTL's request that she do so. Smith Dep. 15. The legislative hearings were orchestrated by Whalen and Randash, private individuals acting for anti-abortion groups, who arranged for all the witnesses for the bill and distributed a fact sheet accusing Susan Cahill by name of performing illegal abortions. Randash Dep. 19. Thus, the legislative record clearly shows that HB 442 was enacted with the sole illegitimate purpose of punishing and inhibiting abortion providers, thereby making abortions

more difficult for women to obtain in Montana. Kottel Dec. ¶¶ 2-8.[2]

In fact, all health evidence contradicts the claim that there is any health basis for HB 442. The Board, which regulates and licenses P.A.'s, opposed HB 442, *see* 39a; 54a-55a, and the only extant study comparing the complication rates for first-trimester abortions performed by P.A.'s with those for first-trimester abortions performed by physicians found no significant difference. Complaint Exh. B (Mary Anne Freedman et al., *Comparison of Complication Rates in First Trimester Abortions Performed by Physician Assistants and Physicians*, 76 AM. J. PUB. HEALTH 550 (1986)). Further, Cahill, the only physician assistant affected by HB 442, has performed early abortions under Dr. Armstrong's supervision safely in Montana for over eighteen years. Cahill Dec. ¶ 9; Armstrong Dec. ¶ 16. Since HB 442 applies to all abortions, it covers both surgical and medical abortions, thus severely handicapping the ability of Montana physicians to use P.A.'s in medical abortion clinical trials. *See* Brown Dec.

HB 442 is a narrow criminal law that does not even pretend to regulate the authority of any of the other physician assistants in Montana who provide a wide array of other types of medical care that pose greater health risks than a first-trimester abortion. Cahill Dec. ¶¶ 10, 15; Armstrong Dec. ¶ 18. Indeed, on its face, the Montana

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[2]Concerned that the Attorney General might not adequately defend HB 442, Whalen sought to intervene on behalf of state representative Richard Simpkins because of the Attorney General's "outspoken political position with respect to the issue of abortion and the so-called right of women to abort their unborn children without restriction," Simpkins Aff. ¶ 5, and not because of the Attorney General's positions on women's health.

Abortion Control Act statute, which HB 442 amends, contains an explicit statement of its purpose and intent to prevent abortions:

> The legislature reaffirms the tradition of the state of Montana to protect every human life, whether unborn or aged, healthy or sick. In keeping with this tradition and in the spirit of our constitution, we affirm the intent to extend the protection of the laws of Montana in favor of all human life.
>
> It is the intent of the legislature to restrict abortion to the extent permissible under decisions of appropriate courts or paramount legislation.

Mont. Code Ann. § 50-20-102 (statement of purpose); § 50-20-103 (legislative intent of Montana Abortion Control Act).

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because this case is in a procedural posture in which there has not even been a preliminary decision favorable to the respondents. Further, the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. The decision of the court below is in conflict neither with the decisions of this Court nor with the decisions of other United States courts of appeals. Further, no important question of federal law is raised by this case "that has not been, but should be, settled by this Court," Sup. Ct. R. 10(c). Accordingly, the petition should be denied.

I. THE ISSUES RAISED IN THE PETITION ARE NOT YET RIPE FOR REVIEW.

A. The Petition For Certiorari Should Be Denied Because The Court of Appeals Has Not Ruled On Respondents' Motion For A Preliminary Injunction.

The procedural posture of this case makes it particularly inappropriate for review by this Court. The decision of a court of appeals is not ripe for certiorari review when that court has deferred disposition of the motion before it until the conclusion of further proceedings in the district court. Indeed, as set forth at Point I(B) below, this Court typically does not grant certiorari in cases involving appeals from preliminary injunctions; and in this case, the district court has yet to complete its assessment under the preliminary injunction standard. This Court explicitly addressed this situation in *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967). In that case, a petition for certiorari had been preceded by the following events:

> The District Court entered contempt orders, imposing substantial fines for alleged violation of its restraining order. The Court of Appeals ruled on various legal issues presented to it but remanded to the District Court to consider whether there had in fact been a contempt, and, also, if there was a contempt, whether it was "of such magnitude as to warrant retention, in part or to any extent, of the coercive fine originally provided for in contemplation of an outright refusal to obey."

Id. at 327-28. In response to the petition for certiorari, this Court stated the following:

> Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied.

Id. at 328.

Like the petition in *Brotherhood*, the Petition in this case not only involves a non-dispositive motion, but the court of appeals has not yet even ruled on that motion. To the contrary, after concluding that the lower court used improper standards in denying injunctive relief, the court of appeals remanded the matter for further proceedings. *See* 8a. The court of appeals explicitly concluded that "it would be inappropriate to address the propriety of a preliminary injunction without the benefit of the district court's balancing of the hardships in light of this opinion." *Id.* In short, Petitioner asks the court to address a motion for preliminary injunction as to which the district court has not yet properly balanced the hardships and on which the court of appeals has not ruled. The prematurity of this request is strikingly illustrated by the fact that if the petition is granted, respondents will be in the difficult position of defending the decision of the court of appeals before this Court without even knowing if that decision ultimately leads to a grant or denial of their motion for preliminary injunctive relief.

B. The Interlocutory Nature Of The Proceedings In This Case Makes Review Inappropriate.

Absent extraordinary circumstances, this Court will not grant certiorari to review a lower court decision prior to final judgment in the case. *Hamilton-Brown Shoe Company*

v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916) (the Supreme Court's "jurisdiction to review the judgments and decrees of the circuit court of appeals by certiorari . . . is a jurisdiction to be exercised sparingly . . . And, except in extraordinary cases, the writ is not issued until final decree.") *See also Virginia Military Institute v. United States*, 113 S.Ct. 2431, 2432 (1993) (Scalia, J., concurring) ("We generally await final judgment in the lower courts before exercising our certiorari jurisdiction."); *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting) (referring to Court's "normal practice of denying interlocutory review"); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 196 (7th ed. 1993) (discussing Court's ordinary practice of denying interlocutory review); CHARLES A. WRIGHT ET AL., 17 FEDERAL PRACTICE AND PROCEDURE § 4036 at 27 (2d ed. 1988) (footnotes omitted) (Court's grant of certiorari before final judgment is "rare"). Accordingly, here, where the lower courts have not yet even rendered an interlocutory order favorable to respondents, review by this Court is perforce premature.

Sound reasons underlie this Court's restraint with respect to interlocutory review. First, the granting of certiorari prior to final judgment may engage the Court in wholly unnecessary decisionmaking:

> [M]any orders made in the progress of the suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.

American Construction Co. v. Jacksonville, T. & K. W Ry. Co., 148 U.S. 372, 384 (1893). In addition, as Justice Stevens has noted, the Court's "violation of its normal practice of denying interlocutory review . . . [may] ill serve[] the interest of judicial economy." *Estelle*, 429 U.S. at 114-15 (Stevens, J., dissenting). Finally, in controversial cases such as this one, a grant of certiorari before final judgment may undesirably prevent the parties from fully developing and adjusting their positions. *See* WRIGHT, *supra*, § 4036 at 20-21 (discussing grant of certiorari prior to judgment in court of appeals). Accordingly, the interlocutory nature of a ruling is "itself alone . . . sufficient ground for the denial of the application [for certiorari]." *Hamilton-Brown Shoe*, 240 U.S. at 258.

Petitioner asks this Court to review the court of appeal's reversal and remand of the district court's partial denial of Respondents' preliminary injunction motion. A motion for preliminary injunction has the limited purpose of maintaining the status quo until the outcome of a trial on the merits, and the findings of fact and rulings of law made in the determination of that motion are not binding at trial. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). Moreover, a motion for a preliminary injunction is often made in haste on the basis of incomplete evidence and arguments and without all of the formal procedures of a trial. *See id.* Thus, the Petition embodies all of the Court's reasons for denying interlocutory review: the decision of the court of appeals was made without the benefit of a complete factual record or fully developed arguments; its opinion does not represent its final determinations on the merits of the case; and the relevance of that opinion may be changed by the progress of the case.

Nor does this case fall within the limited circumstances in which this Court has granted certiorari to review

interlocutory decisions. Such review is only appropriate where the issue of law presented: is clear-cut; would otherwise qualify as a basis for certiorari; and is fundamental to the further conduct of the case. *Michael v. United States*, 454 U.S. 950, 951-52 (1981) (White, J., dissenting); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 196 (7th ed. 1993). *See also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945.) (reviewing lower court decision which presented a discrete issue of law on which the federal courts were in conflict, and which was "fundamental to the further conduct of the case"). These circumstances are not present here.

This Court has granted certiorari prior to final judgment to review particularly clear-cut issues. *See, e.g., Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949) (certiorari granted to consider whether allegation of tortious conduct by agent of sovereign made the suit one against the agent individually, rather than the sovereign). This case does not yet present such clearly-framed questions. According to Petitioner, the Court of Appeals erred in: (1) holding that Respondents have established a fair chance of success on their "undue burden" claim; and (2) construing the purpose prong of *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), to require anything more than a rational basis examination of a statute's purpose. The lower court's rulings were made in the unique context of considering preliminary injunctive relief, which requires the courts to weigh a variety of legal and factual considerations and make hasty evaluations as to the nature and merit of the legal issues presented. In addition, a court's application of the undue burden test is a very complicated, and often fact-laden, task. *See, e.g., A Woman's Choice-East Side Women's Clinic v. Newman*, 904 F. Supp. 1434 (S.D. Ind. 1995) (applying undue burden test), *appeal stayed*, No. 3965 (7th Cir. Jan. 22, 1995); *Women's Medical Prof'l*

Corp. v. Voinovich, 911 F. Supp. 1051 (W.D. Ohio 1995) (same), *appeal docketed*, Nos. 96-3157 & 96-3159 (6th Cir. Feb. 8, 1996). In these circumstances, the issues on which Petitioner seeks review simply cannot be found to be "clear-cut."

Second, as set forth below at Points II, this case would not in any event satisfy the factors that weigh in favor of granting certiorari. As the district court in this case noted, there is a "paucity of case law addressing the precise issue presented in this case." 20a. The courts have simply not yet decided, either directly or by analogy, whether under *Casey* a state may constitutionally pass a law prohibiting the previously legal practice of abortion by a qualified nonphysician medical provider. Moreover, the lower courts in this case have not yet ruled on that issue except to conclude that on the facts thus far presented, the complaint presents a serious question. With only this finding of possible success and the lack of other law addressing the matter, this case does not create a real conflict among the courts or present important federal questions which warrant review at this stage of the proceedings.

Finally, the issues addressed by the court of appeals are not so fundamental to further proceedings in the case as to merit interlocutory review. Such review has been granted where the issue presented went to the very nature of the proceedings or to the court's jurisdiction over those proceedings. *See, e.g.*, *Land v. Dollar*, 330 U.S. 731 (1947) (certiorari granted where court of appeals reversed district court's dismissal of case on basis of lack of jurisdiction); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500 (1959) (certiorari granted to review lower court rulings depriving party of right to jury trial). The issues presented by the Petition do not go to the nature of the proceedings, but to the merits of Respondents' claims.

Interlocutory review has also been granted where the lower courts have ruled on the ultimate merits of a party's claims. *See, e.g., Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) (certiorari granted where district court struck certain claims from complaint); *Estelle*, 429 U.S. 97 (certiorari granted where court of appeals reversed district court dismissal of case on the merits). Neither lower court in this case has made anything more than a preliminary assessment of the merits of Respondents' claims. On the contrary, as discussed below, the court of appeals has not yet even disposed of Respondents' preliminary injunction motion.[3] Thus, the Petition fails to establish that this case falls within one of the narrow categories in which this Court grants certiorari on an interlocutory order.

C. The Petition Improperly Seeks Determination Of A Constitutional Issue On Which The Lower Courts Have Not Yet Ruled.

Petitioner seeks a determination from this Court that Respondents have no chance of success on their undue burden claim. This request is inappropriate for a number of reasons in addition to those already discussed. First, Petitioner asks the Court to make a constitutional determination which may not be necessary to resolution of this case. *Spector Motor Service, Inc. v. McLaughlin*, 323

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[3]By contrast, in the cases in which this Court has reviewed a decision on preliminary injunctive relief, the court of appeals had already ruled that a preliminary injunction either was or was not warranted. *See, e.g., Building & Constr. Trades Council v. Associated Builders & Contractors*, 507 U.S. 218 (1993) (certiorari granted where court of appeals reversed district court's denial of preliminary injunction and ordered entry of that injunction); *International Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466 (1991) (certiorari granted after court of appeals affirmed district court's issuance of preliminary injunction).

U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."). The courts below have only ruled that Respondents have shown a "fair chance" of success. Thus, those courts may yet decide that Respondents have failed to prove their claims. Further, the determination Petitioner now seeks has not yet been made or rejected by the lower courts, but will be made or rejected by the district court on remand. That determination can be more appropriately made after summary judgment or trial than after ruling on a motion for preliminary injunction. *See Fargo Women's Health Org. v. Schafer*, 113 S. Ct. 1668, 1669 (1993) (O'Connor, J., concurring in denial of stay) (emphasizing fact-intensive nature of undue burden test).

II. THE DECISION OF THE COURT BELOW DOES NOT CONFLICT WITH CASES DECIDED BY THIS COURT AUTHORIZING STATES TO LIMIT THE PERFORMANCE OF ABORTIONS TO LICENSED PHYSICIANS.

The State argues that the finding of the court below that plaintiffs have a "fair chance of success" on the merits of their case is *per se* incorrect because decisions of this Court have indicated that States may limit the performance of abortions to licensed physicians. But this argument misses the mark for two reasons. First, Montana gives certain broad agency rights to all licensed physicians to augment their practices by utilizing P.A.'s. Second, Montana explicitly licensed a trained non-physician -- respondent Cahill, a physician assistant-certified -- to perform abortions. HB 442 is a criminal statute that terminated her ability to do so with the *purpose* and *effect*

of imposing a substantial obstacle in the path of women seeking abortions.[4]

Moreover, the statute's termination of Cahill's legal ability to perform abortions, after the attempts to prosecute her and Armstrong failed, was motivated by a desire to punish her, and in fact imposed a traditional punishment upon her, and therefore violates the Bill of Attainder Clause of Article I, Section 10 of the United States Constitution. Thus, even assuming *arguendo* that the Montana Legislature acted within the constitutional bounds of *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), in enacting HB 442, it violated a distinct

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[4]Before HB 442, the Montana Legislature expressly extended that scope of practice of physicians to include the right to use state-approved P.A.'s to perform enumerated state-approved procedures. HB 442 is a restriction on respondent Armstrong's right to practice medicine. Thus, contrary to the State's suggestion, Pet. 19 & n.5, a finding that plaintiffs have a fair chance of success on the merits is irrelevant to other state laws restricting the practice of abortions to licensed physicians. Further, this statute was enacted with the impermissible purpose of impeding access to abortion services, and with the impermissible effect of eliminating one qualified abortion provider. Also, as set forth at Point II(B) below, these statutes -- unlike HB 442 -- were not intended as punishment of an individual abortion provider, and therefore do not implicate the Bill of Attainder Clause.

Finally, it is not at all clear that other state statutes prohibit a physician from utilizing a physician assistant to perform first-trimester abortions under the physician's supervision. For example, the New York State Health Department has construed its statute limiting the practice of abortion to licensed physicians, together with its later-enacted statute regarding practice of physician assistants, to *permit* physician assistants to perform abortions. Opinion Letter of State of New York Department of Health to Donna Lieberman (Dec. 20, 1994) at 1 (opining that physician assistant statute "supersedes the physician requirement of the [New York] Penal Law and permits PAs to perform abortions").

constitutional provision entirely unrelated to whether or not States may limit the practice of abortions to licensed physicians. Accordingly, the court below properly held that plaintiffs have a fair chance of success on the merits.

A. Dicta In This Court's Cases Indicating That States May Constitutionally Limit The Practice Of Abortions To Licensed Physicians Are Not In Conflict With The Decision Of The Court Of Appeals.

HB 442 is not rendered constitutional simply because this Court has stated in *dicta* that "it is permissible for the States to impose criminal sanctions on the performance of an abortion by a nonphysician." *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416, 430 n.12 (1983) (citing *Connecticut v. Menillo*, 423 U.S. 9, 11 (1975)). No Supreme Court decision has approved the criminalization of abortion by a nonphysician *when the abortion is performed under the direct supervision of a physician, and under the auspices of a state medical board, by a competent non-physician medical provider*. Indeed, *Menillo* spoke not simply of a right to choose an abortion performed by physicians, but of "*a woman's right to a clinical abortion by medically competent personnel*." *Menillo*, 423 U.S. at 10 (emphasis added). Because Cahill is "medically competent" to perform an abortion under the supervision of a physician, her continuing ability to do so falls squarely under the protection of *Roe* and *Casey*.

Moreover, none of the statements in this Court's opinions, or other court opinions, affirming the authority of states to limit the performance of abortions to physicians, applies to circumstances like those of this case. In *Menillo*, for example, the Court was reviewing the conviction of a

layman who "ha[d] never had any medical training." 423 U.S. at 9. Similarly, no lower federal court opinions hold that a State may bar a physician from utilizing a properly trained medical professional from performing abortions under his supervision, in the context of an elaborate state licensing scheme that gives all other physicians the right to utilize their agents to perform other medical procedures of equal risk. Rather, these cases simply reiterate that a state may limit the performance of abortions by nonphysicians, either in *dicta* or in contexts unrelated to the performance of abortions by competent nonphysician medical providers. *See Birth Control Ctrs., Inc. v. Reizen*, 743 F.2d 352, 364 (6th Cir. 1984) (holding that because Michigan rule did not impose requirement of special physician expertise, it was consistent with *Roe*); *Florida Women's Medical Clinic, Inc. v. Smith*, 536 F. Supp. 1048, 1057 (S.D. Fla. 1982) (rejecting challenge "if one has been made" to regulation mandating that first-trimester abortions be performed by a licensed physician), *appeal dismissed*, 706 F.2d 1172 (11th Cir. 1983); *Smith v. Bentley*, 493 F. Supp. 916, 927 (E.D. Ark. 1980) (three-judge court) (invalidating, as applied to physicians, Arkansas statute that criminalized abortion performed by "anyone," but observing that it could still be applied to "laymen"); *Planned Parenthood v. Ashcroft*, 483 F. Supp. 679, 684-85 (W.D. Mo. 1980) (application of Missouri statute to "nonphysician performing an abortion *on another person*" was not challenged in case challenging application of statute to self-induced abortions) (emphasis in original), *aff'd in part & rev'd in part on other grounds & remanded*, 655 F.2d 848 (8th Cir. 1981), *aff'd after remand*, 664 F.2d 687 (8th Cir. 1981), *aff'd in part & rev'd in part on other grounds*, 472 U.S. 476 (1983); *see also Wright v. State*, 351 So. 2d 708, 710 (Fla. 1977) (addressing only severability of physician requirement, not its substantive validity). None of these cases lends support to the proposition that a State, having once authorized a

medically competent nonphysician to perform abortions, may subsequently withdraw that authorization solely to achieve the impermissible purpose, and with the unconstitutional effect, of making abortion less accessible to women.

This Court in *Roe* wrote that a state "may define the term 'physician' . . . to mean only a physician currently licensed by the State. . . ." 410 U.S. at 165. But a State is not free to define physician in one way for medical practice generally, and another way for those physicians who decide to provide abortion services. Because Montana has, in its 1983 statute regulating physician assistants, elaborately set forth a definition of a physician's scope of practice that includes P.A.'s, it should not now be heard to argue that it has one definition of "licensed physician" for a single doctor in the State -- Dr. Armstrong -- and another, broader definition that applies to the hundreds of other physicians in the State.

Finally, this Court has recognized that advances in medicine may result in invalidation of previously valid restrictions on abortion. For example, in *City of Akron*, 462 U.S. at 438-39, this Court held that it is unconstitutional to require all second-trimester abortions to be performed in hospitals -- something the *Roe* Court spoke of approvingly. *Roe*, 410 U.S. at 163; *see also Akron*, 462 U.S. at 435-36 (chronicling dramatic increase in safety of second-trimester abortions since *Roe*). Similarly, *Roe* did not anticipate that early abortions could be performed with pills; but today first trimester abortions are performed not only surgically but medically. *Roe* also did not anticipate that mid-level health care professionals would be utilized throughout the United States to work with physicians as physician extenders, performing a wide range of medical

procedures and with authority to prescribe virtually any drug.

B. Respondents' Bill Of Attainder Claim Is Fully Supported By This Court's Bill Of Attainder Precedents.

The same purpose analysis that establishes a likelihood of success for respondents on their undue burden claim establishes a likelihood of success on the bill of attainder claim. Under either claim, HB 442 does not serve a "legitimate health function."

In discussing the purpose inquiry to be conducted on remand by the district court, the court below wrote that HB 442 must be scrutinized to determine "whether that statute in fact can be regarded as serving a legitimate health function." 7a. The court of appeals held that "the district court's view of its ability to consider the purpose or effect of the legislation was unduly confined for the purpose of determining whether appellants have a fair chance of ultimate success." 6a. This broader purpose inquiry establishes that respondents have a high probability of succeeding on their bill of attainder claim; this claim exactly fits this Court's bill of attainder jurisprudence, which seeks to protect disfavored individuals or classes of individuals -- like Communists or abortion providers -- from legislative punishment. Thus, an independent reason that the petition should be denied is that HB 442's purpose, properly scrutinized, supports a meritorious claim not only under *Casey* but under the Bill of Attainder Clause. The largely undisputed evidence that HB 442 was enacted solely to punish respondent Cahill and serves no legitimate health function establishes a likelihood of success both as to

respondents' undue burden purpose claim, and respondents' claim that HB 442's purpose is punitive.

The district court did not apply the correct constitutional standards governing bill of attainder claims. Indeed, the district court's review of plaintiffs' bill of attainder claim is so deferential and perfunctory that it renders the bill of attainder clause a nullity. Although few statutes have been invalidated as bills of attainder, the facts in this case fit the motivational, functional and historical tests for establishing legislative punishment under bill of attainder doctrine like a glove. HB 442 is a criminal statute singling out the only P.A. who provides abortions in Montana and removes only her authorization to practice the core specialty of her profession. In the context of an elaborate regulatory scheme licensing P.A.'s to do surgical and other procedures, only one procedure -- abortion -- was singled out. The State Board of Medical Examiners, which licenses Cahill and other P.A.'s, told the Montana Legislature it opposed HB 442 because it "isolated" one group of health care providers, and "singled out" that group. *See* 54a-55a.

Respondents Cahill and Armstrong fulfill the three elements necessary to prove a bill of attainder: specificity, punishment, and lack of a judicial trial. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 847, 852 (1984). The court of appeals appropriately remanded the case to the district court for determination of whether respondents have a fair chance of success of meeting these elements in their challenge to HB 442. Only the "punishment" prong is in dispute.[5]

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[5]As to specificity, the law targets only Ms. Cahill's ability to perform abortions under Dr. Armstrong's supervision; no other physician has (continued...)

In *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), the Court described three tests for what constitutes "punishment" necessary to defeat a law under the Bill of Attainder Clause: the historical test; the functional test; the motivational test. *Id.* at 473, 475-476, 478; *Selective Service System*, 468 U.S. at 852. Respondents satisfy all three tests, yet only *one* of must be met to prevail. *Id.*, 468 U.S. at 847, 852; *see also* LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 652-55 (1988 ed.).

The historic test asks whether a statute imposes a form of punishment or disability that has been historically condemned as an attaint. *Selective Service System*, 468 U.S. at 853. Stripping an individual of her vocation, as HB 442 does to Ms. Cahill, is a traditional punishment. As pointed out by this Court in *Nixon*, legislative enactments barring individuals or groups from a particular vocation are historically a form of punishment condemned by the Bill of Attainder Clause. *Nixon*, 433 U.S. at 474-75; *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (barring clergymen from ministry in the absence of subscribing to a loyalty oath); *United States v. Lovett*, 328 U.S. 303 (1946) (barring named individuals from government employment); *United States v. Brown*, 381 U.S. 437 (1965) (barring communist party members from offices in labor unions). The court of appeals decision to remand to the district court is consistent with these cases.

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[5](...continued)
ever applied to utilize a P.A. to perform abortions in Montana. *See* 25a n.4 (district court observation that "Susan Cahill is the only physician assistant-certified who presently performs abortions in the State of Montana."). Petitioner has not disputed that HB 442 eliminates Ms. Cahill's vocation and punishes her without a judicial trial.

The functional test asks whether the law, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon*, 433 U.S. at 475-476; *see also Selective Service*, 468 U.S. at 853-54. The only "nonpunitive" purpose proffered by the State is the purpose of promoting health. The court of appeals properly rejected the district court's belief that it was unable to "impugn" this alleged purpose.

The district court made no analysis of the type and severity of this law, which is to be balanced against the degree to which a law might further a nonpunitive end. The severity of this prohibition is complete. Susan Cahill cannot, ever, perform abortions in Montana. In contrast to this case, in *Nixon* there were circumstances mitigating the severity of the law: the Court noted that President Nixon was compensated for his papers, 433 U.S. at 475, had complete access to them, *id.* at 481 n.46, there was a time limit on retention, *id.* at 481, and that the law did not affect the core of his job. Similarly, in *Selective Service*, 468 U.S. at 850-51, the Court found the selective service registration statute not as prohibitive as the statutes prohibiting vocations in *Cummings* and *Ex parte Garland*, 71 U.S. (4 Wall.) 333 (1867), because students could register late, and still get financial aid without being penalized.

The Bill of Attainder Clause is one of the few constitutional provisions that on its face mandates rigorous scrutiny into intent, for the "very nature of the constitutional question requires an inquiry into legislative purpose." *United States v. O'Brien*, 391 U.S. 367, 383 n.30 (1968). The phrase "reasonably furthers," in cases involving constitutional scrutiny, means more than low-level rational basis scrutiny. For example, in *Hodgson v.*

Minnesota, 497 U.S. 417 (1990), this Court struck down an abortion law requiring notice to both parents because, looking at the evidence, it found that the law "does not reasonably further any legitimate state interest." *Id.* at 450. The Court found further that the statute was not only ineffective in achieving legitimate state goals, but was actually counterproductive in some family situations. *Id.* at 450-51. *See also Turner v. Safley*, 482 U.S. 78, 97-99 (1987); *Carey v. Population Services Int'l*, 431 U.S. 678, 716 (1977) (Stevens, J., concurring in part and concurring in the judgment).[6]

The third test for what constitutes "punishment" is the motivational test, which is an inquiry into whether the legislative intent was punitive. *Selective Service*, 468 U.S. at 852. In Bill of Attainder cases, like undue burden purpose cases, *see Jane L. v. Bangerter*, 102 F.3d 1112, 1116 (10th Cir. 1996), *petition for cert. filed*, No. 96-1481 (docketed Mar. 18, 1997), the purpose inquiry is part of the constitutional test. Therefore, as under the Establishment Clause, *see Edwards v. Aguillard*, 482 U.S. 578, 586-87

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[6]In *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670 (1981), this Court conducted a similar examination under the Commerce Clause of whether an Iowa law restricting certain trucks would further an ostensible health and safety purpose. The Court reviewed approvingly a 14-day district court trial on safety comparisons which concluded that the prohibited 65 foot trucks were as safe as 55 foot trucks. *Id.* at 667-68. Moreover, just like the burden this law would impose by rerouting women in Montana, the Supreme Court found the Iowa restriction irrational because rerouting trucks around Iowa would have the effect of causing more accidents. *Id.* at 674-75. Further, unlike in *Kassel*, in which Iowa at least presented some evidence on safety, the State in this case has never presented any evidence showing how the existing P.A. scheme harmed women or how the health of women would be promoted by excluding Ms. Cahill from providing abortions.

(1987); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), "primary purpose" should be the defining standard. .

As shown by plaintiffs' unrebutted evidence, the facts leading up to this legislation, the elaborate state P.A. licensing scheme, the opposition to the bill by the State Medical Board, the discriminatory design of the statute, the unusual manner in which it was introduced and passed, the statements of the sponsor, and the detrimental impact on women's health, all prove that HB 442 has an invalid purpose to block access to abortion by punishing respondents Cahill and Armstrong.

Moreover, the question of whether HB 442 actually furthers the asserted goal of protecting women's health is one the district court must independently examine not just under the functional test, but as further evidence of the statute's true purpose. Under the Commerce Clause, for example, in the *Kassel* case, the Court found that the design of the statute (exempting trucks carrying Iowa livestock) and its inevitable effect were both *proof* of an impermissible protectionist purpose. *Id.*, 450 U.S. at 676-77.

Under *Nixon*'s motivational test, the purpose of HB 442 is not to further women's health in Montana, but to carry out the punitive goals of the Montana Right to Life Association and other anti-abortion groups who had previously sought to achieve their goals by asking the Executive Branch (law enforcement authorities) to prosecute respondents Cahill and Armstrong for precisely the same acts made criminal by HB 442.

Because respondents' Bill of Attainder claim is entirely consistent with this Court's cases construing the Bill of Attainder Clauses, the court of appeals properly vacated the district court's decision and instructed it to balance the

hardships. Thus, all the factors that this Court considers in deciding whether to grant certiorari indicate that the petition should be denied.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: March 28, 1997.

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Supreme Court, U.S.
FILED
APR 10 1997
OFFICE OF THE CLERK

No. 96-1104

In The

Supreme Court of the United States

October Term, 1996

JOSEPH MAZUREK, in his official capacity as Attorney General of the State of Montana,

Petitioner,

v.

JAMES H. ARMSTRONG, M.D.; MARK MILES, M.D.; SUSAN WICKLUND, M.D.; SUSAN CAHILL, P.A.; MARY STRANAHAN, D.O.; BETH E. THOMPSON, M.D.; and EDWIN L. STICKNEY, M.D., on behalf of themselves and their patients throughout Montana, the surrounding states and Canada and on behalf of a class of performing and referring physicians,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

The Petition presents the straightforward issue whether a state legislature may prohibit persons other than licensed physicians from performing abortions. Until the Court of Appeals' decision below, there existed no dispute over the States' discretion to impose such a limitation, since this Court had recognized that authority explicitly in *Roe v. Wade*, 410 U.S. 113, 165 (1972), *Connecticut v. Menillo*, 423 U.S. 9 (1975) (per curiam), and *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 447 (1983). It is therefore perhaps unsurprising the Respondents devote only three pages to the question presented, instead focusing on the assertion that the Court's intervention now would be premature and on a lengthy, but for instant purposes immaterial, analysis of their claim under the Bill of Attainder Clause, U.S. Const. art. I, § 10. The Petitioners do not contest the proposition that this Court ordinarily refrains from entertaining issues except where a final judgment has entered. However, this is not an ordinary case; it is a paradigm of a lower federal court departing from a well-marked path in an area of exceptional public policy sensitivity. The Court of Appeals' error is one of law that should be rectified now rather than later to avoid unnecessary litigation over an issue long since resolved by this Court.

ARGUMENT

I. THE DECISION BELOW RAISES ONLY A QUESTION OF LAW THAT IS FUNDAMENTAL TO FURTHER LITIGATION OF THE RESPONDENTS' UNDUE BURDEN CLAIM AND THAT HAS BEEN DECIDED BY THIS AND EVERY OTHER COURT CONTRARY TO THE COURT OF APPEALS.

The Respondents argue that "[t]he lower court's rulings were made in the unique context of considering preliminary injunctive relief, which requires the courts to weigh a variety of legal and factual considerations and make hasty evaluations as to the nature and merit of the legal issues presented." Resp'ts Br. in Opp'n ("Opp'n") at 13. However accurate their characterization of the preliminary injunction process might be in other situations, the Court of Appeals' determination was neither hasty nor fact-bound. The court was concerned not with factual nuance but with the standard by which the Respondents' undue burden claim under *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), was to be assessed. It thus found the District Court's analysis concerning the purpose of Mont. Code Ann. § 50-20-109(1)(a) (1995) "unduly confined" (Pet. App. 6a) and remanded for a factual assessment "of the totality of circumstances surrounding the enactment of [the physician-only requirement] [ ] and whether that statute in fact can be regarded as serving a legitimate health function" (*id.* 7a). The Court of Appeals itself made no factual findings. The heart of the opinion below is a purely legal determination that physician-only requirements like Montana's are not per se valid and that a searching

inquiry into legislative motivation, together with an evidentiary examination of the extent to which the physician-only restriction achieves its health-related objective, is mandated under *Casey's* undue burden test.

This Court has exercised its authority under 28 U.S.C. § 1254(1) to review rulings other than in connection with a final judgment "where [the ruling] is fundamental to the further conduct of the case." *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *accord Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964). The issue in *General Motors* was whether certain expenditures and losses could be recovered in addition to the actual fair rental value of property condemned by the United States; the district court had rejected an offer of proof by the plaintiff in that regard, but the court of appeals concluded the additional amounts were recoverable and remanded for trial over their amount. In *Gillespie* the question was whether the Jones Act, 46 U.S.C. § 688, provided the exclusive remedy with respect to claims arising from the death of a seaman – a question that arose in an interlocutory appeal from the district court's decision striking allegations from a complaint seeking recovery under state law wrongful death provisions. Consequently, in both cases issues whose determination could have awaited later certiorari proceedings following final determination of the cases were addressed because they were central to orderly and efficient resolution of the controversies and involved only questions of law otherwise warranting review. *See also Estelle v. Gamble*, 429 U.S. 97 (1976) (whether court of appeals properly reversed district court's judgment dismissing complaint for failure

to state a claim); *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R.*, 417 U.S. 703 (1974) (same).

The circumstances here are even more compelling. The Court of Appeals concluded that the Respondents had stated a claim under the Due Process Clause of the Fourteenth Amendment, specified the standards under which that claim is to be resolved, and remanded for further proceedings consistent with those standards. It did so, however, without reference to this Court's contrary decisions in *Roe, Menillo* and *Akron* or the uniform body of contrary decisional authority in state and lower federal courts. The Court of Appeals further did so without considering the utter anomalousness of its reliance on *Casey* – i.e., holding that a State may be precluded by the undue burden standard from requiring abortions to be performed by physicians notwithstanding the fact *Casey* found no impermissible burden in a statutory mandate that physicians give certain portions of a pre-abortion *advisement*. The lower court's ruling thus presents only a question of law and structures the remainder of the litigation in a manner clearly incompatible with settled, binding precedent. Review should occur now. *See Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 755 (1986) (finding appellate jurisdiction under 28 U.S.C. § 1254(2) absent because "the judgment is not final[ ] and . . . the case is remanded for further development of the facts" but nonetheless granting review by certiorari).

II. THE UNDUE BURDEN STANDARD ADOPTED IN *CASEY* DOES NOT LIMIT THE MONTANA LEGISLATURE'S AUTHORITY TO IMPOSE A PHYSICIAN-ONLY REQUIREMENT.

The Respondents contend that no decisions support "the proposition that a State, having once authorized a medically competent nonphysician to perform abortions, may subsequently withdraw that authorization solely to achieve the impermissible purpose, and with the unconstitutional effect, of making abortion less accessible to women." Opp'n at 19-20. Stripped of its rhetoric, therefore, the Respondents' position is that this Court's abortion-related decisions do not allow States to adopt legislation whose effect is to impose more stringent limitations on the performance of abortions without, at least potentially, running afoul of the undue burden standard in *Casey* – even though the restriction itself has been found by this Court to be constitutionally permissible.

The Respondents' theory ignores the fact that *Roe* and later abortion decisions by this Court have been directed at giving guidance to States about what is, and what is not, constitutionally permissible and thereby facilitating adoption of valid abortion-related statutes. Part XI of *Roe*, which "summarize[d]" and "repeat[ed]" the holdings in earlier sections of the opinion, thus referred to "the State" repeatedly, and it seems plain the Court meant not merely Texas but any State. 410 U.S. at 164-66. One of those holdings, of course, authorized statutes or regulations that limit performance of abortions to "a physician currently licensed by the State" and proscribe abortions by all others. *Id.* at 165. The joint opinion in *Casey* reiterated its fidelity with the "essential holding"

of *Roe*, 505 U.S. at 873, and nothing in the later opinion suggests that *Roe*'s approval of physician-only requirements was to be compromised by the undue burden standard. It is accordingly odd for the Respondents to contend the Montana legislature was disabled by that standard from imposing such a requirement merely because, in the past, one class of nonphysicians had been recognized by the Montana Board of Medical Examiners as statutorily eligible to perform abortions.

The oddness of the Respondents' position with respect to the Montana statute stems from an unwillingness to express forthrightly its fundamental predicate: *Any* State's physician-only requirement is subject to challenge under the Due Process Clause where a claim is made that certain types of abortions can be performed competently by nonphysicians and that the State's refusal to authorize such performance unduly burdens access to abortions. The actual breadth of their position is reflected in the assertions that "this Court has recognized that advances in medicine may result in invalidation of previously valid restrictions on abortion" and that *Roe* "did not anticipate that mid-level health care professionals would be utilized throughout the United States to work with physicians as physician extenders, performing a wide range of medical procedures and with authority to prescribe virtually any drug." Opp'n at 20-21.

What the Respondents miss, however, is that *Roe* established a per se rule permitting States to prohibit performance of abortions by nonphysicians because physicians reasonably may be assumed to be *most* competent to perform abortions. *Roe*, in other words, stands for the

proposition that such restrictions are inherently appropriate and need not be revisited whenever a nonphysician feels aggrieved by them. *Cf. California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 n.17 (1987). Indeed, were the assumption untrue, there would be no reason for Respondent Cahill to be supervised by a physician like Respondent Armstrong – an "agency" relationship the Respondents agree must exist. Opp'n at 17 (contending that no decision of this Court "has approved the criminalization of abortion by a nonphysician under the direct supervision of a physician, and under the auspices of a state medical board, by a competent medical provider"); *see* Mont. Code Ann. § 37-20-101(c) (1995) (requiring physician named in physician assistant's utilization plan to "submit a statement to the board [of medical examiners] that he will exercise supervision over the physician assistant-certified in accordance with any rules adopted by the board and will retain professional and legal responsibility for the care and treatment of his patients"); *id.* § 37-20-403(1) ("[i]n establishing protocol, a physician assistant-certified must be considered the agent of the supervising physician with respect to all duties delegated to the physician assistant-certified under the utilization plan").[1] Logically extended, moreover, the

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[1] The Respondents remark that "[b]ecause Montana has, in its 1983 statute regulating physician assistants, elaborately set forth a definition of a physician's scope of practice that includes P.A.'s, it should not now be heard to argue that it has one definition of 'licensed physician' for a single doctor in the State – Dr. Armstrong – and another, broader definition that applies to the hundreds of other physicians in the State." Opp'n at 20. Although the precise import of this point is elusive, it is undisputed that Armstrong as a supervising physician is

Respondents' theory would make competency to perform an abortion an affirmative defense to prosecution under a physician-only statute – an unprecedented intrusion on the rights of States to control medical practice. *See, e.g., Spears v. Circuit Court*, 517 F.2d 360, 368 (5th Cir. 1975) (rejecting habeas corpus claim by midwife convicted for performing abortion); *Wright v. State*, 351 So. 2d 708, 711 (Fla. 1977) (affirming conviction of nurse under physician-only statute).

Finally, the Respondents have chosen to ignore the Petition's analysis concerning the rational basis standard applied by the *Casey* joint opinion when upholding Pennsylvania's requirement that certain portions of the patient advisement be given by a physician. 505 U.S. at 884-85. This silence is telling since there is simply no accommodating a result which permits a State to mandate that a physician be responsible for explaining, inter alia, "[t]he nature of the proposed procedure or treatment and of those risks and alternatives that a reasonable patient would consider material to the decision of whether or not to undergo the abortion" (18 Pa. Cons. Stat. § 3205(a)(1)(i) (1990)) and simultaneously prohibits a State from requiring that only a physician perform the ensuing abortion. Such a result would be even contrary to *Akron* which, after striking down a physician advisement requirement

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treated no differently than other supervising physicians under the challenged statute – i.e., no physician assistant can include within a utilization plan the performance of abortions. The challenged legislation, despite the Respondents' focus on Cahill, affects all physician assistants who may wish to perform abortions.

substantively identical to one later upheld in *Casey*, reiterated that "States may mandate that only physicians perform abortions." 462 U.S. at 447. The Respondents' position on the merits, like the Court of Appeals' decision, can be credited only if almost twenty-five years of precedent are placed aside.[2]

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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April 1997

[2] As mentioned earlier, the Respondents devote far more attention in their opposition to the Bill of Attainder claim raised below than to the undue burden claim relied upon by the Court of Appeals in vacating the District Court's denial of a preliminary injunction. Opp'n at 21-27. The former claim, while appropriate for consideration by the Court of Appeals on remand if its judgment is reversed, is immaterial to the question presented. *See, e.g., Lebron v. National R.R. Passenger Corp.*, 115 S. Ct. 961, 965-66 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 534-38 (1992); *Wise v. Lipscomb*, 437 U.S. 535, 547 (1978).

(4)

SUPREME COURT OF THE UNITED STATES

JOSEPH P. MAZUREK, ATTORNEY GENERAL OF MONTANA *v.* JAMES H. ARMSTRONG ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–1104. Decided June 16, 1997

PER CURIAM.

In 1995, the Montana Legislature enacted a statute restricting the performance of abortions to licensed physicians. 1995 Mont. Laws, ch. 321, §2 (codified at Mont. Code Ann. §50–20–109 (1995)). Similar rules exist in 40 other States in the Nation.[1] The Montana

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[1] See Ala. Admin. Code Rules 420–5–1–.01(2)(k), 420–5–1–.03(2)(a) (Supp. 1990) (limiting performance of abortions to "physicians duly licensed in the State of Alabama," which in turn requires meeting the criteria in Ala. Code §34–24–70 (Supp. 1996)); Alaska Stat. Ann. §§08.64.200, 18.16.010(a)(1) (1996); Ark. Code Ann. §5–61–101(a) (1993); *id.*, §17–95–403 (1995); Cal. Health & Safety Code Ann. §123405 (West 1996) (as interpreted under prior statutory designation in 74 Op. Cal. Atty. Gen. 101 (1991)); Colo. Rev. Stat. §12–36–107 (Supp. 1996); *id.*, §§18–6–101(1), 18–6–102 (1986); Conn. Agencies Regs. §19–13–D54(a) (1997) (limiting performance of abortions to "person[s] licensed to practice medicine and surgery in the State of Connecticut," which in turn requires meeting the criteria in Conn. Gen. Stat. §20–10 (Supp. 1997)); Del. Code. Ann., Tit. 24, §§1720, 1790(a) (Supp. 1996); Fla. Stat. Ann. §§390.001(1)(a), 390.001(3) (1993); *id.*, §§458.311, 459.0055 (1991 and Supp. 1997); Ga. Code Ann. §16–12–141(a) (1996); *id.*, §43–34–27 (1994); Haw. Rev. Stat. §§453–4, 453–16(a)(1) (1993); Idaho Code §18–608 (1997); *id.*, §§54–1803(3), 54–1803(4) (1994); Ill. Comp. Stat., ch. 225, §60/11 (1993); *id.*, ch. 720, §§510/2(2), 510/3.1 (1993); Ind. Code. §§16–18–2–202, 16–18–2–282, 16–34–2–1(1)(A) (1993); *id.*, §25–22.5–3–1 (1995); Iowa Code §§148.3, 707.7 (Supp. 1997); Ky. Rev. Stat. Ann. §§311.571, 311.750 (Michie 1995); La. Rev. Stat. Ann. §37:1272 (West Supp. 1997); *id.*, §§40:1299.35.1, 40.1299.35.2(A)

law was challenged almost immediately by respondents, who are a group of licensed physicians and one physician-assistant practicing in Montana. The District Court denied respondents' motion for a preliminary injunction,

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(West 1992); Me. Rev. Stat. Ann., Tit. 22, §1598(3)(A) (1992); *id.*, Tit. 32, §§2571, 3271 (Supp. 1996); Md. Health Code Ann. §20–208 (1996); Md. Health Occ. Code Ann. §14–307 (Supp. 1995); Mass. Gen. Laws, ch. 112, §§2, 12K, 12L, 12M (1996); Minn. Stat. §§145.412, subd. 1(1), 147.02 (1989) (limiting performance of abortions to licensed physicians and "physician[s] in training under the supervision of . . . licensed physician[s]"); Miss. Code Ann. §73–25–3 (1995); *id.*, §97–3–3(1) (1994) (as interpreted in *Spears* v. *State*, 278 So. 2d 443 (Miss. 1973)); Mo. Rev. Stat. §§188.015(5), 188.020 (1996); *id.*, §334.031 (1989); Neb. Rev. Stat. §28–335 (1995); *id.*, §71–1,104 (Supp. 1996); Nev. Rev. Stat. §442.250(1)(a) (1991); *id.*, §630.160 (1995); N. J. Admin. Code §13:35–4.2(b) (1997) (limiting performance of abortions to "physician[s] licensed to practice medicine and surgery in the State of New Jersey," which in turn requires meeting the criteria in N. J. Stat. Ann. §§45:9–6, 45:9–7 (West 1991), and N. J. Stat. Ann. §45:9–8 (West Supp. 1997)); N. M. Stat. Ann. §§30–5–1(C), 30–5–3 (1994) (as interpreted in N. M. Op. Atty. Gen. 90–19 (1990)); N. M. Stat. Ann. §61–6–11 (1996); N. C. Gen. Stat. §14–45.1(a) (1993); *id.*, §90–9 (Supp. 1996); N. D. Cent. Code §14–02.1–04(1) (1991); *id.*, §43–17–18 (1993); Ohio Rev. Code Ann. §2919.11 (1996); *id.*, §§4731.091, 4731.41 (1994); Okla. Stat., Tit. 59, §493.1 (Supp. 1997); *id.*, Tit. 63, §1–731(A) (1997); 18 Pa. Cons. Stat. §§3203, 3204(a) (1983 and Supp. 1997); 63 Pa. Cons. Stat. §§271.6, 422.28 (1996); R. I. Code R. 14.000.009, 600.1 (1996) (limiting performance of abortions to "physicians licensed under the [applicable provisions of Rhode Island law]," which in turn requires meeting the criteria in R. I. Gen. Laws §5–37–2 (1995)); S. C. Code Ann. §40–47–90 (Supp. 1996) (as implemented by S. C. Code Ann. Regs. §§81–80, 81–81, 81–90 (Supp. 1996)); S. C. Code. Ann. §§44–41–10(b), 44–41–20 (1985); S. D. Codified Laws §34–23A–1(4) (Supp. 1997); *id.*, §§34–23A–3, 34–23A–4, 34–23A–5 (1994); *id.*, §36–4–11 (Supp. 1997); Tex. Health & Safety Code Ann. §245.010(b) (1992); Tex. Rev. Civ. Stat. Ann., Art. 4495b, §3.04 (Vernon Supp. 1997); Utah Code Ann. §§58–67–302, 58–68–302 (Supp. 1996); *id.*, §76–7–302(1) (1995); Va. Code Ann. §§18.2–71, 18.2–72, 18.2–73, 18.2–74 (1996); *id.*, §54.1–2930 (1994); Wash. Rev. Code §§9.02.110, 9.02.120, 9.02.170(4) (Supp. 1997); *id.*, §§18.57.020, 18.71.050 (Supp. 1997); Wis. Stat. §§448.01(5) (1988 and Supp. 1996); *id.*, §940.15(5) (1996); Wyo. Stat. §33–26–303 (Supp. 1996); *id.*, §35–6–111 (1994).

finding that they had not established any likelihood of prevailing on their claim that the law imposed an "undue burden" within the meaning of *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833 (1992). 906 F. Supp. 561, 567 (Mont. 1995). The Court of Appeals for the Ninth Circuit vacated the District Court's judgment, holding that respondents had shown a "fair chance of success on the merits" of their claim, and thus had met the threshold requirement for preliminary injunctive relief under Circuit precedent. 94 F. 3d 566, 567–568 (1996). The case was remanded to the District Court with instructions to reconsider the "balance of hardships" and determine whether entry of a preliminary injunction was ultimately warranted. *Ibid.* The District Court has not yet reconsidered the merits of the preliminary-injunction motion, but it has entered (based on the parties' stipulations) an injunction pending appeal pursuant to Federal Rule of Civil Procedure 62(c), and has postponed its hearing on the preliminary-injunction motion until our disposition of petitioner's certiorari petition. Order Granting Injunction Pending Appeal, No. CV 95–083–GF–PGH (Mont., Nov. 5, 1996), App. to Pet. for Cert. 31a–32a. As a consequence, Montana's physician-only requirement is unenforceable at the present time against respondent Susan Cahill, who is the only nonphysician licensed to perform abortions in Montana.

The Court of Appeals' conclusion that respondents had established a "fair chance of success on the merits" of their constitutional challenge is inconsistent with our treatment of the physician-only requirement at issue in *Casey*. That requirement involved only the provision of *information* to patients, and not the actual *performance* of abortions, yet we nonetheless held—overruling our prior holding in *Akron* v. *Akron Center for Reproductive Health, Inc.,* 462 U. S. 416, 448 (1983)—that the limitation to physicians was valid. *Casey, supra,* at 884–885. We found that "[s]ince there is no evidence on this record that requiring a doctor to give the informa-

tion as provided by the statute would amount in practical terms to a *substantial obstacle to a woman seeking an abortion*, . . . it is not an undue burden." 505 U. S., at 884–885 (emphasis added). The District Court, quoting this precise passage, held: "There exists insufficient evidence in the record to support the conclusion [that] the requirement that a licensed physician perform an abortion would amount, 'in practical terms, to a *substantial obstacle to a woman seeking an abortion*.' Accordingly, it is unlikely that [respondents] will prevail upon their suggestion that the requirement constitutes an 'undue burden' within the meaning of *Casey*." 906 F. Supp., at 567 (quoting *Casey, supra,* at 884 (emphasis added)).

The Court of Appeals never contested this District Court conclusion that there was "insufficient evidence in the record" that the requirement posed a "substantial obstacle to a woman seeking an abortion." Instead, it held that the physician-only requirement was arguably invalid because its *purpose*, according to the Court of Appeals, may have been to create a substantial obstacle to women seeking abortions. 94 F. 3d, at 567. But even assuming the correctness of the Court of Appeals' implicit premise—that a legislative *purpose* to interfere with the constitutionally protected right to abortion without the *effect* of interfering with that right (here it is uncontested that there was insufficient evidence of a "substantial obstacle" to abortion) could render the Montana law invalid—there is no basis for finding a vitiating legislative purpose here. We do not assume unconstitutional legislative intent even when statutes produce harmful results, see, *e.g.*, *Washington* v. *Davis*, 426 U. S. 229, 246 (1976); much less do we assume it when the results are harmless. One searches the Court of Appeals' opinion in vain for any mention of any evidence suggesting an unlawful motive on the part of the Montana Legislature. If the motion at issue here were a defendant's motion for summary judgment, and if the plaintiff's only basis for proceeding with the suit

were a claim of improper legislative purpose, one would demand *some* evidence of that improper purpose in order to avoid a nonsuit. And what is at issue here is not even a defendant's motion for summary judgment, but a plaintiff's motion for preliminary injunctive relief, as to which the requirement for substantial proof is much higher. "It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." 11A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure §2948, pp. 129–130 (2d ed. 1995) (emphasis added; footnotes omitted).

Respondents claim in this Court that the Montana law must have had an invalid purpose because "all health evidence contradicts the claim that there is any health basis" for the law. Brief in Opposition 7. Respondents contend that "the only extant study comparing the complication rates for first-trimester abortions performed by [physician-assistants] with those for first-trimester abortions performed by physicians found no significant difference." *Ibid.* But this line of argument is squarely foreclosed by *Casey* itself. In the course of upholding the physician-only requirement at issue in that case, we emphasized that "[o]ur cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, *even if an objective assessment might suggest that those same tasks could be performed by others.*" 505 U. S., at 885 (emphasis added). Respondents fall back on the fact that an anti-abortion group drafted the Montana law. But that says nothing significant about the legislature's purpose in passing it.

Today's dissent, for its part, claims that "there is substantial evidence indicating that the sole purpose of the statute was to target a particular licensed professional" (respondent Susan Cahill). *Post,* at 4. It is true that the law "targeted" Cahill in the sense that she was

the only nonphysician performing abortions at the time it was passed. But it is difficult to see how that helps rather than harms respondents' case. The dissent does not claim that this was an unconstitutional bill of attainder, nor was that the basis on which the Court of Appeals relied. (Such a contention would be implausible as applied to a provision so commonplace as to exist in 40 other States, see n. 1, *supra*.) And the basis on which the Court of Appeals *did* rely (that the purpose of the law may have been to create a "substantial obstacle" to abortion) is positively contradicted by the fact that only a single practitioner is affected. That is especially so since under the old scheme Cahill could only perform abortions with a licensed physician (who also performs abortions) present, see Brief in Opposition 4, meaning that no woman seeking an abortion would be required by the new law to travel to a different facility than was previously available. All this strongly supports the District Court's finding, after hearing testimony, that there was insufficient evidence that the law created a "substantial obstacle" to abortion. And there is simply no evidence that the legislature intended the law to do what it plainly did not do.[2]

The Court of Appeals' decision is also contradicted by our repeated statements in past cases—none of which was so much as cited by the Court of Appeals, despite the District Court's discussion of two of them—that the performance of abortions may be restricted to physicians. We first expressed this view (although it was not necessary to our holding) in *Roe* v. *Wade*, 410 U. S. 113, 165 (1973), saying that "[t]he State may define the term 'physician,' . . . to mean only a physician currently

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[2] Since the record does not support a conclusion that "the legislature's predominant motive, see *Shaw* [v. *Hunt*, 517 U. S. ___ (1996)]," *post*, at 4, was to create a "substantial obstacle" to abortion, it is quite unnecessary to address "whether the Court of Appeals misread this Court's opinions in *Miller* [v. *Johnson*, 515 U. S. ___ (1995)] and *Shaw*," *post*, at 5–6.

licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined." We reiterated this view in *Connecticut* v. *Menillo*, 423 U. S. 9, 11 (1975), where, in the course of holding that the Federal Constitution posed no bar to the conviction of a person with no medical training for the performance of an abortion, we said that "prosecutions for abortions conducted by nonphysicians infringe upon no realm of personal privacy secured by the Constitution against state interference." Finally, in *Akron*, *supra*, in the course of striking down a requirement that licensed physicians rather than other medical personnel provide specified information to patients (the holding overruled in *Casey*), we emphasized that our prior cases "left no doubt that, to ensure the safety of the abortion procedure, the States may mandate that only physicians perform abortions." 462 U. S., at 447 (citing *Roe*, *supra*, at 165, and *Menillo*, *supra*, at 11).

Respondents urge us to ignore the error in the Court of Appeals' judgment because the case comes to us prior to the entry of a final judgment in the lower courts. It is true that we are ordinarily reluctant to exercise our certiorari jurisdiction in that circumstance. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916). But our cases make clear that there is no absolute bar to review of nonfinal judgments of the lower federal courts, see, *e.g.*, *Estelle* v. *Gamble*, 429 U. S. 97, 98 (1976); *United States* v. *General Motors Corp.*, 323 U. S. 373, 377 (1945); see also R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice §4.18 (7th ed. 1993) (citing cases), and we conclude here that reversal of the Court of Appeals' judgment in a summary disposition is appropriate, for two reasons. First, as already noted, the Court of Appeals' decision is clearly erroneous under our precedents.[3] Second, the lower court's judgment has pro-

[3] The dissent says that the Court of Appeals did not resolve any

duced immediate consequences for Montana—in the form of a Rule 62(c) injunction against implementation of its law pending the District Court's resolution of respondents' motion for a preliminary injunction—and has created a real threat of such consequences for the six other States in the Ninth Circuit that have physician-only requirements.[4] Indeed, plaintiffs in the Ninth Circuit seeking to challenge those States' laws may well be able to meet the threshold "fair chance of success" requirement for a preliminary injunction merely by alleging an improper purpose for the physician-only rule, since, as noted above, the Court of Appeals did not appear to rely on any evidence suggesting an unlawful motive on the part of the Montana Legislature.[5]

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important issue of law in this case, but instead merely remanded to the District Court after "determin[ing] that a further inquiry into the facts [was] appropriate." *Post*, at 4, 5. We disagree. The Court of Appeals expressly found, and it was necessary to its disposition, that respondents had shown a "fair chance of success" on their claim of undue burden. 94 F.3d 566, 567–568 (CA9 1996). As already explained, that determination of law is inconsistent with our precedents.

[4] See Alaska Stat. Ann. §§08.64.200, 18.16.010(a)(1) (1996); Cal. Health & Safety Code Ann. §123405 (West 1996) (as interpreted under prior statutory designation in 74 Op. Cal. Atty. Gen. 101 (1991)); Haw. Rev. Stat. §§453–4, 453–16(a)(1) (1993); Idaho Code §18–608 (1997); *id.*, §§54–1803(3), 54–1803(4) (1994); Nev. Rev. Stat. §442.250(1)(a) (1991); *id.*, §630.160 (1995); Wash. Rev. Code §§9.02.110, 9.02.120, 9.02.170(4) (Supp. 1997); *id.*, §§18.57.020, 18.71.050 (Supp. 1997).

[5] The dissent contends that some States which restrict the performance of abortions to licensed physicians may define "licensed physician" to include "physician-assistant" when the latter works under the former's supervision; thus, the dissent says, the Court of Appeals' decision may not in fact be inconsistent with the physician-only regimes of other States. *Post*, at 5. But the provisions of state law to which the dissent points reflect the general definition of what qualifies as the "authorized practice" of medicine, without making any specific reference to abortion. See, *e.g.*, Fla. Stat. Ann. §§458.303(1)(a), 458.327(1), 458.347 (1991 and Supp. 1997); *post*, at 5, n. 7 (citing statutes). Thus, for example, under Florida law, the

For the foregoing reasons, we grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand for further proceedings consistent with this opinion.

It is so ordered.

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performance of an abortion by a physician-assistant would not constitute "practic[ing] medicine . . . without a license" for purposes of the felony defined in Fla. Stat. Ann. §458.327(1), but there is no reason to think it would not violate the more specific prohibition on the performance of abortions by persons other than "a doctor of medicine or osteopathic medicine licensed by the state under chapter 458 or chapter 459," Fla. Stat. Ann. §§390.001(1)(a), 390.001(3) (1993). A formal opinion by the Attorney General of California has reached precisely this conclusion under that State's law: "[W]e cannot accept the notion that the Legislature meant to gainsay th[e] carefully tailored and highly specific determination [that abortions should be performed by licensed physicians] when it . . . adopted the general language of the Physician Assistant Practice Act." 74 Op. Cal. Atty. Gen. 101, 108 (1991).

(5)

SUPREME COURT OF THE UNITED STATES

JOSEPH P. MAZUREK, ATTORNEY GENERAL OF MONTANA *v.* JAMES H. ARMSTRONG ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 96–1104. Decided June 16, 1997

JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, dissenting.

The Court may ultimately prove to be correct in its conclusion that the Court of Appeals should have affirmed the District Court's refusal to preliminarily enjoin that portion of the statute disqualifying Susan Cahill from performing abortions in Montana. Nevertheless, I do not agree that this decision has sufficient importance to justify review of the merits at this preliminary stage of the proceeding. The background of the litigation and a comment on the Court of Appeals' discussion of legislative motive will help to explain why I am not persuaded that the Court's summary disposition is appropriate.

Since 1977, respondent Cahill, a licensed physician's assistant, has been performing first-trimester abortions in Kalispell, Montana, under the supervision of Dr. James Armstrong. She is the only nonphysician in Montana who performs abortions.

Since 1974, Montana law has provided that an abortion could be performed only by a licensed physician. See Mont. Code Ann. §50–20–109(1)(a) (1995). Because the term "licensed physician," as used in that statute was construed to include licensed physician assistants working under the direct supervision of a physician

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pursuant to a state approved plan,[1] it did not disqualify Cahill from continuing her work with Dr. Armstrong.

In 1995, the Montana Legislature enacted the statute at issue in this litigation. This statute banned physician assistants from performing abortions, provided that second-trimester abortions could only be performed in licensed hospitals, and prohibited any form of advertising of abortion services. See 1995 Mont. Laws, ch. 321. The record strongly indicates that the physician assistant provision was aimed at excluding one specific person—respondent Cahill—from the category of persons who could perform abortions. Although this is not apparent on the face of the statute, the parties agree that because Cahill is the only physician assistant who performs abortions in the State of Montana, she is the only person affected by the ban. Furthermore, the legislative hearings preceding the enactment of the statute contain numerous references to Cahill by name,[2] and the injunction against enforcement of this provision of the statute pending the appeal applies only to Cahill.[3]

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[1] See *Doe* v. *Esch*, No. CV-93-060-FG-PGH (Nov. 26, 1993), App. to Pet. for Cert. 33a (enjoining State from enforcing the licensed physician provision against a physician assistant, supervised by a licensed physician, who has received approval from the State Board of Medical Examiners to conduct abortions); see also Mont. Code Ann. §37-20-403 (1993) (recognizing physician assistant as agent of the supervising physician); Mont. Code Ann. §37-20-303 (1995) (authorizing Board of Medical Examiners to approve physician assistant utilization plans detailing range of physician assistants' practice); *Armstrong* v. *Mazurek*, 906 F. Supp. 561, 564 (Mont. 1995) (noting that the Montana Board of Medical Examiners construed its authority to include approval of Cahill's utilization plan allowing her to perform first-trimester abortions).

[2] See Minutes of Committee on Public Health, Welfare & Safety, Montana Senate, 54th Legislature (Mar. 10, 1995), reprinted in App. to Pet. for Cert. 50a-60a.

[3] "1. The injunction shall apply only to Plaintiff Susan Cahill and will allow her to practice under those terms in *effect* prior to October 1, 1995. Plaintiff Cahill must be supervised by a licensed physician and shall operate under the physician assistant-certified

The likelihood that the legislature may have enacted the statute for the sole purpose of targeting Cahill is suggested by the fact that the other two provisions in the 1995 Act—the hospitalization requirement and the advertising ban—were clearly invalid because they were reenactments of two provisions that already had been held unconstitutional in earlier litigation,[4] and that the State, in this litigation, conceded to be unconstitutional.[5] This history, together with Cahill's claim that the same antiabortion groups who had repeatedly targeted Cahill and Armstrong's practice were the proponents of the 1995 legislation, provided the basis for Cahill's argument that the statute was invalid as a bill of attainder, as well as an undue burden on the right to an abortion.

The discussion of legislative motive in the opinion of the Court of Appeals was a response to two decisions of this Court that suggest that such an inquiry is sometimes proper. In determining whether the "requirements serve no purpose other than to make abortions more difficult," within the meaning of *Planned Parenthood of Southeastern Pa.* v. *Casey,* 505 U. S. 833, 901 (1992), the Court of Appeals looked to our recent decisions in *Miller* v. *Johnson,* 515 U. S. ___, ___ (1995), and *Shaw* v.

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utilization plan previously approved by the Montana State Board of Medical Examiners that includes the performance of abortions pursuant to the provisions of Mont. Code Ann. Title 37, chapter 20. No other physician assistants-certified will be allowed to perform abortions in Montana under the terms of this stipulation or the Court's order." App. to Pet. for Cert. 32a.

[4]In *Doe* v. *Esch, supra,* the court enjoined enforcement of the hospitalization requirement, and in *Doe* v. *Deschamps,* 461 F. Supp. 682 (Mont. 1976), the court held that the advertising and solicitation prohibition were unconstitutional.

[5]Respondents challenged these two provisions—along with the ban on performance of abortions by physician assistants, and the State did not contest that it was bound by the prior judgments from enforcing these prohibitions. See 906 F. Supp., at 563.

Hunt, 517 U. S. ___ (1996).[6] Today, the Court ignores those cases, but concludes that the record is barren of evidence of any improper motive. As the discussion above indicates, this is not quite accurate; there is substantial evidence indicating that the sole purpose of the statute was to target a particular licensed professional. The statute removed the only physician assistant in the State who could perform abortions, yet there was no evidence that her practice posed any greater health risks than those performed by doctors with the assistance of unlicensed personnel. When one looks at the totality of circumstances surrounding the legislation, there is evidence from which one could conclude that the legislature's predominant motive, see *id.*, at ___ (slip op., at 4–5), was to make abortions more difficult.

In any event, the Court of Appeals did not reach the constitutional issue that is presented by this litigation. The Court of Appeals simply remanded this action to the District Court because it found that the District Court had unduly confined its analysis of what constitutes an impermissible purpose. Although the parties stipulated to the entry of a limited injunction pending appeal that temporarily protects Cahill and no one else, there is no indication yet from either the District Court or the Court of Appeals that either a permanent or preliminary injunction will ever be entered against enforcement of the physician-only provision of the statute.

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[6]The Court of Appeals reasoned: "Legislative purpose to accomplish a constitutionally forbidden result may be found when that purpose was 'the predominant factor motivating the legislature's decision.' *Miller*[, 515 U. S., at ___ (slip op., at 15)]. Such a forbidden purpose may be gleaned both from the structure of the legislation and from examination of the process that led to its enactment. *Shaw*[, 517 U. S., at ___, ___ (slip op., at 3–6)]. A determination of purpose in the present case, then, may properly require an assessment of the totality of circumstances surrounding the enactment of Chapter 321, and whether that statute in fact can be regarded as serving a legitimate health function." 94 F. 3d 566, 567 (CA9 1996).

As I read the decisions of the Court of Appeals and the District Court, this case involves an extremely narrow issue concerning the State's power to reduce by one the small number of professionals in Montana who can lawfully perform abortions in that State. I do not perceive the slightest threat to the 40 "physician only" laws cited at the outset of the Court's opinion, particularly since some of these States might allow licensed assistants to perform abortions under the supervision of a physician as was the practice in Montana prior to 1995.[7] Because physician assistants working under the supervision of a physician might be included in the definition of "physician," it is not clear at this stage that the Court of Appeals' decision challenges any of this Court's statements (for the most part dicta), *ante,* at 6, that a State may restrict the performance of abortions to physicians. I think the Court would be well-advised to await further developments in the case before intervening. Surely, the Court of Appeals' determination that a further inquiry into the facts is appropriate before making a final decision on the motion for a preliminary injunction does not provide a proper basis for summary action in this Court.

Having decided to take the case, however, it does

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[7]Some of the States that have physician-only laws also have statutes that broadly define the medical duties that physicians can delegate to physician assistants. See, *e.g.*, Conn. Gen. Stat. §§20–12a, 20–12d (1997); Fla. Stat. Ann. §458.347 (Supp. 1997); Ill. Comp. Stat. Ann. ch. 225, §§95/1, 95/4(3) (1993 and 1997 Supp. Pamph.); Ind. Code §§25–27.5–5–2, 25–27.5–6–3 (1993); Iowa Code Ann. §§148C.1, 148C.4 (1989); La. Rev. Stat. Ann. §§37:1360.22(5), 37:1360.28, 37:1360.31.A(1), B (West Supp. 1997); Me. Rev. Stat. Ann., Tit. 32, §3270–A (Supp. 1996); Mass. Gen. Laws, §112:9E (1994); Neb. Rev. Stat. §71–1,107.17 (1996); R. I. Gen. Laws §5–54–8 (1995). My research indicates that Montana and California are the only States that explicitly prohibit physician assistants from performing abortions. See 74 Op. Cal. Atty. Gen. 101 (1991) (declining to construe the physician assistant statute to allow physician assistants to perform abortions).

seem to me that the Court should provide some enlightenment as to whether the Court of Appeals misread this Court's opinions in *Miller* and *Shaw* v. *Hunt*.

In my judgment, the petition for certiorari should be denied.